Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1999

James Franklin Gibson,
James Edward Norris,
Pro Per

Petitioners

v.

Federico Pena, Secretary
Department of Transportation

Respondent

On Petition For Writ Of Certiorari
To The United States Court of Appeals
for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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39pp

QUESTIONS PRESENTED

1. Whether Petitioner's rights under the Free Speech clause of the First and Fourteenth Amendment were violated by the Defendant's actions of retaliation when the Petitioner spoke out on a matter of public concern, racial discrimination, being enacted against a fellow federal employee, co-petitioner, James E. Norris, at the Federal Aviation Administration Flight Standards District Office in Los Angeles, by the Defendant.

2. Whether the lower court erred when it did not require the Defendant to answer Plaintiff's request for discovery and first set of interrogatories, which would have fully developed factual issues involving the Defendant's motivation of racial animus, and, which violated the plaintiff's rights of due process, before granting the defendant Summary Judgment.

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INTRODUCTORY PRAYER

The Petitioners James F. Gibson and James E. Norris pray that the Supreme Court grant a Writ of Certiorari to review the judgment of the court.

OPINIONS BELOW

A. Constitutional Provisions.

B. Title VII of the Civil Rights Acts of 1964 and the Civil Rights Act of 1991.

C. Federal Rules of Civil Procedure, Rule 56 (C) and (F), 28 U.S.C.A.

D. Copy of lower court decision, Sept. 30, 1996.

E. U.S. Court of Appeals for the Ninth Circuit, July 23, 1998.

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N. FAA Medical Certificate Revocation, Sept., Oct. 1990.

O. Aviation Safety Inspectors who failed out of the Academy.

P. Statement from Denver FSDO Supervisor, John Keller.

Q. Testimony from FAA Academy Supervisor, Lindsey 'Pete' Helquist.

LIST OF PARTIES

Federico Pena, Sec. of Transportation, Defendant Appellee

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit, was entered on July 23, 1998. The Court of Appeals denied a timely petition for rehearing en banc on February 17, 1999.

The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

STATUTES, CONSTITUTIONAL PROVISIONS AND RULES

The text of the following authorities relevant to the determination of the present case are set forth in the appendix; United States Constitutional First and Fourteenth Amendments, Title VII of the Civil Rights Act of 1964, and the Federal Rules of Civil Procedure - Rule 56 (C) & (F).

A. The First Amendment of the Constitution protects individuals against federal government infringements on free speech. Free speech is a liberty protected against infringement by the due process clause of the Fourteenth Amendment.

B. Title VII of the Civil Rights Act of 1964.

C. Federal Rules of Civil Procedure, Rule 56 (C) & (F).

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STATEMENT OF THE CASE

The jurisdiction of the District Court was invoked under Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Act of 1972, 42 U.S.C. §1331(general federal question jurisdiction).

The following statement of this case will truthfully state and/or summarize the pertinent facts related to this case, and, will be accurately referenced to the record still in the possession of the lower court.

Petitioner James F. Gibson was employed by the Federal Aviation Administration (hereafter, FAA) as an Aviation Safety Inspector and assigned to the Flight Standards District Office (hereafter, FSDO) in Los Angeles, California (hereafter, LAX)on July 1, 1988. Within a few days after he had reported for duty to the LAX FSDO, he began hearing strong racial remarks and observing racial actions being made against another FAA Aviation Safety Inspector at the LAX FSDO, co-petitioner James Edward Norris. These remarks and actions against James Norris, were based entirely on the fact that he was an African-American, and nothing else. Norris' work and attendance record, conduct and background record were excellent, however, the FAA Aviation Safety Inspector who was in charge of Gibson's training, Mr. Jerry Parrott, and, the LAX FSDO operations supervisor, Mr. Robert Bebout, were totally motivated and driven to have Norris terminated, for no other reason than his race.

By the end of July 1988, newly appointed LAX FSDO manager, Mrs. Bonnie Pankella, assigned Gibson to take Inspector Norris to a local Fixed Base Operator in the Los Angeles

area and give him "refresher training" in Instrument Procedures. This was because Mrs. Pankella realized that Norris was lacking in recency of experience, because he had been flying very little since his arrival at the LAX FSDO in April of 1988.

During the first month that petitioner Gibson was in the LAX FSDO petitioner Norris' flight skills were a common topic of conversation between Mr. Bebout, Mr. Parrott, and another inspector in the office, Mr. Claire Milton, and, always included harsh racial overtones. However, Mr. Bebout and Mr. Parrott were never considering giving Norris any "refresher training," to bring his flight skills up to par. The plan to give Norris "refresher training" at a Fixed Based Operator in LA was suggested by Mrs. Pankella.

When Gibson and Norris returned from this refresher training, some several hours later, Gibson was told by Mr. Bebout to report to Mrs. Pankella's office, and Norris was told to return to his desk. Gibson went into Mrs. Pankella's office with Mr. Bebout and was told to shut the door and sit down. Mr. Bebout then looked at Gibson and pointedly asked, "how did he do?" Gibson then explained to Mrs. Pankella and Mr. Bebout, which procedures he and Norris had been practicing, and, explained that Norris "only" needed some additional training to bring his flying skills up to par, however, Mr. Bebout flew into a rage, jumped up out of his seat, and stormed out of the office. Mrs. Pankella seemed to be totally unaware of what was going on with Mr. Bebout, and, obviously knew nothing of Mr. Bebout's and Mr. Parrott's racial motives toward Norris.

Mr. Henry Polchow, a long time LAX FSDO Aviation Safety Inspector (Airworthiness) testified under oath to an EEO Investigator,

in a complaint filed by Mr. Norris, that a day after this incident in Mrs. Pankella's office, he overheard Mr. Bebout threaten Gibson in the hallway by telling him, "I'll get you for that." (In reference to the record and enclosed) Mr. Polchow also testified that he learned from another inspector, the next day, that the reason why Mr. Bebout had threatened Gibson was because Gibson had told Mrs. Pankella that Norris was trainable and only needed refresher training. This was in complete contradiction to what Mr. Bebout and Mr. Parrott had been telling Mrs. Pankella.

Gibson went to the Administrative Officer of the LAX FSDO, Mrs. Donwyn Elder, and told her about what was going on with Mr. Bebout and Mr. Parrott, and, that he would like to speak with Mrs. Pankella. After Mrs. Elder spoke to Mrs. Pankella, Gibson was told to come to her office. He told her the complete story about what had been going on with Mr. Bebout and Mr. Parrott, and, their racist remarks, actions and attitude toward Norris, however, Mrs. Pankella refused to believe that Mr. Bebout or Mr. Parrott thought that way about Norris and dismissed Gibson's verbal complaint to her.

By this time Gibson was not too well thought of by Mr. Bebout and/or Mr. Parrott and his training abruptly ended. Because Gibson was a probationary employee and had not completed one year of Federal Civil Service, he could be terminated for any reason or for none at all. Mr. Bebout and Mr. Parrott then began convincing Mrs. Pankella that Gibson was "untrainable" and should be terminated.

See Rankin v. McPherson (1987, US) 97 L

Ed 2d 315, 107 S CT 2891.[1]

Gibson had very successfully completed two FAA 40.40 Aircraft Rental check rides at the LAX FSDO, one in a single engine Cessna 220, and, the other in a multi-engine Cessna 340, given by FAA Inspector John Roach; taken and successfully completed several FAA correspondent courses; and, had volunteered everyday for "Standby Duty" in the office. However, on January 3, 1989 Gibson was called into Mrs. Pankella's office, and, with Mr. Bebout present, terminated-effective that day. Gibson had an unblemished record in the field of aviation with over 8,500 hours total flight time, and, over 6,000 hours as a FAA Certified Flight Instructor, plus excellent references and letters of recommendation as a pilot/instructor.

A few days after the termination, Gibson filed a formal EEO Complaint on January 23, 1989, alleging retaliation and reprisal by the Agency based on his first termination, however, both the Divisional Manager of Flight Standards, Mr. William Williams, and the Manager of the FAA Western-Pacific Region Civil Rights office, Mr. Vincent Jourbert had told Gibson that because he was a probationary employee, having not completed one year of employment, he could not file an EEO complaint under any circumstances against the Agency. Both Mr. Williams and Mr. Jourbert tried to dissuade Gibson from attempting to file an EEO Complaint, however, the FAA's headquarters in

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[1] "A state may not discharge an employee on a basis that infringes upon that employee's constitutionally protected interest and freedom of speech, even where the employee is probationary and thus could be discharged for any reason or none at all." Rankin v. McPherson (1987, US) 97 L Ed 2d 315, 107 S CT 2891.

Washington, D.C. disagreed and told Mr. Jourbert that Gibson could file a complaint alleging retaliation and reprisal for having opposed unlawful racial actions. An investigator was assigned and over the next several months an investigation was conducted. By August 1989 the investigation and interviews had been completed, which proved that Mr. Bebout's assessment that Gibson was "untrainable" was completely false and without foundation, and, that these actions had been taken because Mr. Bebout had withheld all training from Gibson. This was directly attributable to the fact that Gibson opposed what Mr. Bebout and Mr. Parrott were doing to Norris. Mr. Bebout and Mr. Parrott were obsessed with their campaign to get Norris and the "N" word was used very frequently around the office, as well as other racial gestures and actions. FAA Inspector, Mr. Claire Milton, a close associate of Mr. Bebout and Mr. Parrott, would frequently sneak up behind Norris as he was standing in the hallway, and make gestures, with his hands and arms, simulating a "gorilla," he always referred to Norris by the 'N' word. All of these "activities" by Mr. Bebout, Mr. Parrott, and Mr. Milton were a constant disruption to the efficient operation of the LAX FSDO.

Absolutely no discipline, nor conduct problems were ever alleged against Gibson or Norris while they were employed by the FAA.

In early September 1989, after Gibson had talked to the Equal Employment Opportunity Commission (hereafter EEOC) field office in Phoenix, Arizona, and was advised to file a civil action in U.S. District Court, he called the FAA Civil Rights office in Los Angeles and told Mr. Jourbert that he was going to file a civil action in district court. Mr. Jourbert immediately said that he had a settlement

offer coming and would send it to him right away. The settlement offer called for reinstatement, full back pay, benefits, etc., however, Gibson was told he would be transferred to the Fresno, CA FSDO, and, not to the FSDO in his hometown - Reno, Nevada. This transfer location was for absolutely no given reason, as the FSDO in Reno, Nevada had Inspector openings as well. (A plausible explanation has never been given as to why he had to be assigned to the Fresno FSDO and not assigned to the FSDO in Reno, where he and his family lived.) Not only was he required to maintain living accommodations in Fresno, as well as in Reno for his family, he was also required to make the 600 mile round trip to Reno every weekend to be with his family. Gibson opposed this reassignment location because there was absolutely no reason why he had to be separated from his family, other than further harassment, however, he went ahead and accepted the settlement, and, reported to the Fresno FSDO on September 23, 1989.

One of the primary reasons why Gibson objected to the reinstatement location, was because the manager of the Fresno FSDO, Mr. Edward Hammonds, had previously been the acting manager of the LAX FSDO, until just prior to Gibson's assignment date to the LAX FSDO on July 1, 1988, and, Mr. Hammonds was fully aware of the "situation" going on between Mr. Bebout, Mr. Parrott and Mr. Norris, and he, Mr. Hammonds had contempt for Mr. Norris.

As soon as Gibson reported for duty at the Fresno FSDO on September 23, 1989, Mr. Hammonds made it perfectly clear that he, Gibson, was not welcomed at the Fresno FSDO. He was assigned to a "non-office" room in the back of the building away from the other

Inspectors.

By March 1990 Gibson had successfully completed over 80% of his On-the-Job Training (hereafter OJT) program, (In reference to the record, copy enclosed) had very successfully completed his Performance Evaluation Program (probationary), (In reference to the record, copy enclosed)and, had been conducting Certified Flight Instructor Airplane and Instrument Check Rides, Part 135 (Airtaxi) VFR and IFR Check Rides, and, Designated Examiner Check Rides, all very successfully. (In reference to the record)

In March 1990, just after Gibson received an excellent Performance Evaluation rating which signified a completion of his probationary program he filed a second request for a "hardship transfer" to the Reno FSDO, or to just some FSDO in Northern California, closer to his home in Reno. However, he was told by Mr. Hammonds and Mr. Gibbons that he would have to complete one year at the Fresno FSDO, and, he would have to complete the FAA Academy. This was totally contrary to Rules and Regulations pertaining to a Federal Civil Service Employee's request for a "hardship transfer." Completion of one year at Fresno FSDO and/or completion of the FAA Academy, was not a stipulation of the settlement agreement from Los Angeles, and, was in opposition to regulations pertaining to a "hardship transfer" request.

Several other FAA Aviation Safety Inspectors at the LAX FSDO, with less time in service, had requested a hardship transfer out of the LA office to their hometown, and all were approved, as soon as possible. Gibson was told by many FAA inspector acquaintances at the LAX FSDO, and the Fresno FSDO that, "if they didn't get you at the LA FSDO, they'll get you at the Academy in Oklahoma City."

In Mid-April 1990 Gibson was told that he was scheduled for the May 9, 1990 General Aviation Indoctrination Class at the FAA Academy in Oklahoma City. Gibson's classroom test scores were excellent and he was progressing well in the simulator sessions of jet evaluation.

Gibson's first instructor at the academy, Mr. James Aadland, would not sign him off in an aircraft (supercub) which he had many hours of experience as a pilot and/or instructor, and there was conflict between the two. It was later learned that Mr. Aadland and Mr. Bebout, the operations supervisor at LAX FSDO whom had been directly responsible for Gibson's first termination, had been close personal and professional friends before and during <u>their tour of duty together</u> at the Fargo, North Dakota FSDO.

On May 25, 1990, the supervisor of flight training at the FAA Academy, Mr. Lindsey "Pete" Helquist, scheduled a phase check in a single engine aircraft and requested maneuvers that were all performed very well, however, Gibson was taken back to the airport and told to report to Mr. Helquist's office. Mr. Helquist refused to allow him any additional training, and, failed him out of the Academy. He was told to report back to his home office in Fresno.

When Gibson arrived back in Fresno and reported for duty on May 29, 1990, he was immediately called into Mr. Hammonds' office, told that he was being removed from <u>all</u> duties as a FAA Aviation Safety Inspector, told to turn in his Fresno FSDO office front door keys, and Fresno Airport badges. His name was removed from the office duty roster, and his picture removed from the staff board. He was then told to return to his office until, "we figure out what to do with you." The next day

Gibson was told to move out of his office, into a cubical area without a telephone, and was specifically told, "do not use the telephone." He was then assigned to the duty of making copies of papers for other Inspectors, assembling new furniture for the office, and, doing any other type of menial jobs. Gibson was never offered any flight training for a return to the Academy, and, Mr. Gibbons never offered to fly with Gibson, even though this was standard operating procedures for the Operations Supervisor of a FSDO. Mr. Hammonds took Gibson outside of the building, on several occasions, and told him, "you will not be sent back to the Academy, and, you'd better check your options."

In a memo to the Western-Pacific Region on June 15, 1990, (In reference to the record) Mr. Hammonds told the Region, "I do not recommend that Gibson be given any additional training, or returned to the Academy for another class."

On June 17, 1990 (In reference to the record) Gibson was issued a letter informing him that a '609' (reexamination check ride) under the FA Act of '58, would be conducted on July 17, 1990. This was for no probable cause, and even the petitioner's supervisor, Mr. Clifford Gibbons, told him that, in over 15 years with the Agency, he, Mr. Gibbons, had only known of one other FAA Inspector who had been '609'd', (reexamined) and he, the other Inspector, had crashed an airplane. Mr. Gibbon's commented several times during this period that he, "didn't know why Hammonds is doing this."

Mr. Hammonds refused to tell Gibson the name of the check airman, and from which FSDO he was coming, and, refused to allow Gibson to take the '609' check ride at a FSDO or Region of his choice. (The choice of the location of

the '609' check ride is a right given in regulations and contained in the FAA Aviation Safety Inspector's handbook.) (In reference to the record) Gibson even offered to take the '609' check ride on his own vacation time in Reno, at no cost to the Agency, but Mr. Hammonds strongly refused.

When Mr. Hammonds' actions and motives became extremely suspicious and questionable, Gibson went to his supervisor and asked to be allowed to talk to a "counselor or therapist" at his medical-carrier, Kaiser-Permanette in Fresno. Mr. Gibbons then called Mr. Hammonds and told him of Gibson's request, and, Mr. Gibbons also called the Flight Surgeon of the Western-Pacific Region, Dr. Stephen Goodman, and told him of the request to talk to a therapist.

In an affidavit from Dr. Stephen Goodman (In reference to the record and enclosed) dated November 1, 1990, Dr. Goodman stated that Mr. Hammonds had been calling him, even before Gibson had requested to talk to a therapist, and, telling him that Gibson was acting "erratic" around the office, had requested time off to see "his psychiatrist", and, admitted that he was seeing a "psychiatrist." This was all a complete lie, however, Dr. Goodman never made any attempt to contact Gibson, either in person or by telephone before he started procedures to "revoke" Gibson's FAA medical Certificate. Dr. Goodman also alleged in the Revocation Order that, "By Virtue of your psychiatric history of delusional (paranoid) disorder, persecutory type ....," that he was revoking Gibson's FAA medical certificate. These charges were completely false and highly slanderous.

Gibson's attorney at that time called the Western-Pacific Region and insisted that

Gibson be examined by a Board Certified Psychiatrist. The Agency finally agreed and in November 1990, Gibson was seen in San Francisco by Board Certified Psychiatrist, Dr. Kenneth Gottlieb. After approximately thirty minutes in Dr. Gottlieb's office, he said, "Mr. Gibson, you don't need a psychiatrist, you need an attorney." In Dr. Gottlieb's ten page report to the FAA Western-Pacific Region Flight Surgeon, Dr. Stephen Goodman, he found absolutely no substance nor validity to the charges made against Gibson. (In reference to the record and enclosed)

On November 9, 1990 Administrative Law Judge F. Lamont Liggett of the Merit Systems Protection Board, San Francisco region, issued a "Stay" of the FAA's action to reexamine all of Gibson's FAA Airman Certificates under the FA Act of '58. Judge Liggett found that because Mr. Hammonds had been Acting Manager of the LAX FSDO, and was well acquainted with all of the personnel of that office, and, because of the retaliatory actions which had been perpetrated against Gibson, he was "Staying" the Agency's actions to reexamine Gibson's FAA Airman Certificates. (In reference to the record and enclosed)

In December 1990 the Federal Air Surgeon/Chief Psychiatrist of the FAA in Washington, D.C., Dr. Pakull, returned Gibson's FAA Medical Certificate.

However, on April 5, 1991, Gibson was terminated for the second time, and, on this very same day, an "Emergency Order of Suspension" of Gibson's FAA Airman Certificates was issued by the Assistant Chief Counsel of the Western-Pacific Region, Mr. DeWitt Lawson. Gibson had allegedly failed out of the Academy, and, had allegedly been "insubordinate," by allegedly refusing to take the '609' check ride. Gibson never

refused to take the '609' check ride, but only asked to be allowed the same privileges and/or rights as any other FAA Airman - to have a choice of where the check ride would be given and with whom.

Shortly after Gibson's second termination on April 5, 1991, and, because he was having major problems finding employment in the field of aviation, he made application for California State Unemployment Insurance benefits. The FAA immediately objected to the unemployment claim, that Gibson's stated reason for being terminated was in "retaliation," and, a hearing was scheduled for October 9, 1991, before Administrative Law Judge A.D. Evans of the California State Unemployment Insurance Appeals Board. The Agency called their witnesses to testify and Gibson testified in his own behalf. The decision by Judge Evans (In reference to the record and enclosed) overwhelmingly supported Gibson's charges of retaliation. Following an appeal to the Merit Systems Protection Board, of the second termination on April 5, 1991, Gibson was scheduled for a hearing in September 1991. The defendant was allowed to call any and all of their witnesses, however, Merit Systems Protection Board Administrative Law Judge Lon Bartholomew of the San Francisco region told Gibson that he would not be allowed to call any of his witnesses. Judge Bartholomew also refused to hear all of the evidence related to discrimination, and, to explore the retaliatory factors of the appeal.

On July 31, 1992 Gibson received a "Notice of proposed Certificate Action" from the Assistant Chief Counsel's Office at the Western-Pacific Region in Los Angeles, informing him that if he did not take the '609' check ride by August 14, 1992, fifteen

(15) days later, at a FSDO selected by the Agency, and, with a check airman of their choice, his certificates would be revoked. This was absolutely for no "probable cause", was highly unprecedented, and retaliatory.

It must be remembered that neither Gibson nor Norris had violated any rule, regulation, or law pertaining to conduct, job performance, duty or behavior at the LAX FSDO, or at the Fresno FSDO. Norris attended the FAA Academy after Gibson had been terminated, the second time, and very successfully passed the program with excellent grades.

Gibson immediately filed an appeal of the Revocation Order to the National Transportation Safety Board and a hearing was scheduled for December 1992 in Gardena, California. He retained an attorney, however, a conflict in the attorney's calendar, and, the National Transportation Safety Board's hearing date occurred, and a change of the hearing date was requested. A new hearing date was set for February 19, 1993, however,. in December 1992, Gibson spoke to the Administrative Law Judge assigned to this revocation hearing, and was told by him that he would not be allowed to call any witnesses. After this conversation with the Administrative Law Judge of the NTSB Gibson realized that he didn't have a chance of retaining his certificates at the Revocation hearing, so he begged and borrowed what money he could, maxed out his credit cards, and drove to the Northwest Region to take the check ride. He employed a FAA certified Flight Instructor for the refresher training, and, on February the 5th, 6th & 8th, 1993, took the check ride in Casper, Wyoming with FAA Inspector/Supervisor, Mr. Burl Hardesty, from the Denver FSDO. The check ride and reexamination by Inspector Hardesty, was as

thorough as it could have possibly been, and involved an examination of every maneuver in the Commercial, Flight Instructor, and Airline Transport Pilot's FAA Flight Test Guides.

Mr. Hardesty's letter to the Region (In reference to the record and enclosed) dated February 10, 1993 stated that Gibson had "met or exceeded all of the requirements for the FAA's Commercial Pilot's Certificate," and, "met or exceeded all of the requirements for the FAA's Airline Transport Pilot Certificate." Mr. Hardesty also reinstated Gibson's FAA Certified Flight Instructor Certificate and stated that he could not understand how the agency could justify a '609' of Gibson's FAA Airman Certificates.

The appeal of Gibson's termination on April 5, 1991 to the Merit Systems Protection Board was decided in favor of the defendant - after no investigation, and no witnesses, by the MSPB or the EEOC.

On July 29, 1992, appellant filed a civil action, #CV-92-4522 WDK, in U.S. District Court for the Central District of California, alleging retaliation and reprisal for having openly opposed the racial actions of his supervisor and training officer at the LAX FSDO, for having filed an EEO Complaint - #89-65, on January 23, 1989, and, for having been terminated, in retaliation, the second time on April 5, 1991 by the manager of the Fresno FSDO.

July 17, 1996 was the date assigned by the court for discovery cutoff of this civil action. Co-Plaintiff James E. Norris sent by first class mail two copies of the Plaintiff's "Request for Discovery and First Set of Interrogatories": one to the Assistant U.S. Attorney, Ms. Sara Robinson, and the other to the Clerk of the U.S. District Court in Los Angeles, several days prior to this cutoff

date. However, Ms. Robinson stated in her Appellee's Brief, that she had not received her copy of the Discovery Request "timely", and, therefore was not going to answer the Discovery. The clerk of the U.S. District Court in Los Angeles reported that they received their copy - "timely," however, Assistant U.S. Attorney, Sara Robinson, whose office is right across the street from the United States Courthouse in LA, claims not to have received her copy - "timely." There was no reason why the plaintiff would not have wanted to have their Discovery request received on time.

Plaintiff's Gibson and Norris never had Discovery, and, were never allowed to call any witnesses to testify in their behalf, before a summary judgment was granted, and, consequently, were denied due process.

On September 30, 1996 (In reference to the record and enclosed) Honorable U.S. District Court Judge W.D. Keller issued an order granting Summary Judgment to the Defendant of cases CV-92-4522 WDK and CV-94-7069 WDK (consolidated). This order held that "Gibson and Norris failed to produce specific, substantial evidence of pretext."

On May 6, 1997 Gibson and Norris individually submitted their appeal of the Summary Judgment Order to the United States Court of Appeals for the Ninth Circuit. A memorandum was issued on July 23, 1988 affirming the decision of the lower court. The United State Court of Appeals for the Ninth Circuit held that, "Gibson and Norris' evidence of a causal connection consists of mere allegation and speculation." Appellant Gibson and Norris filed a request for a rehearing En Banc, however, on February 17, 1999, this request was denied.

REASON FOR GRANTING THE PETITION
(Argument)

The evidence of pretextual motive, related to petitioner Gibson's dismissal for the second time on April 5, 1991, is very evident and clear when the Court considers the proven facts, that the Petitioner was terminated the first time on January 3, 1989, following "proven protected activities" of which the employer was aware, and, the second time on August 5, 1991 because of numerous personnel actions which the manager of the Fresno FSDO, Mr. Edward Hammonds, took against him before and after he filed an EEO Complaint on June 17, 1990. This EEO Complaint alleged retaliation and reprisal related to the '609' reexamination action being taken against him.

FREEDOM OF SPEECH VIOLATION

Every personnel action by the defendant taken against the petitioner Gibson at the LAX FSDO in 1988 and 1989, and, at the Fresno FSDO in 1989, 1990 and 1991 were a direct result and consequence of his having evaluated James Norris' piloting skills positively rather than negatively, as Mr. Bebout had wanted. When he reported this to the manager of the LAX FSDO, Mrs. Bonnie Pankella, this report infuriated Mr. Bebout who then initiated major acts of retaliation against he petitioner, and, which directly led to his first terminations on January 3, 1989, following "protected activities" of which the defendant was aware. Numerous personnel actions of retaliation occurred after Gibson was reinstated and assigned to the Fresno FSDO, and, these actions continued until his second termination on April 5, 1991. These personnel actions were a direct consequence of his having spoken out about the unlawful racial actions, which were occurring at the LAX FSDO and for having filed an EEO Complaint against the manager of

the Fresno FSDO, Mr. Edward Hammonds, on June 17, 1990.

Mr. Hammonds was directly responsible for making false reports to the Flight Surgeon of the Western-Pacific Region, and, having Gibson's Medical Certificate revoked; removed from all duties and training; issuing a '609' reexamination of his FAA Airman Certificates; and, terminating him on April 5, 1991.

Plaintiff was discharged following these protected activities, of which the employer was aware, and, this establishes a prima facie case of retaliatory dismissal. (See Aquira v. Chula Vista Sanitary Services, 542 F2d 779 13FEP 1436 (9th Cir. 1976)[2]. The decision by the lower court in CV-92-4522-WDK and CV-94-7069-WDK is in conflict with the decision of Aquira v. Chula Vista Sanitary Services which held that the plaintiffs had not established a prima facie case.

The lower court held in the Minute Order decision on September 30, 1996 that, "a prima facie case is not enough to survive Summary Judgment. ID Gibson must present some evidence that the defendant's proffered reason for dismissal is pretextual."

It has been noted that, under the Hochstadt adaptation of the McDonald Douglas prima facie pattern of proof to retaliation cases, evidence tending to prove pretext is almost inevitably introduced as part of the plaintiff's prima facie proof.

See also "Texas Department of Community

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[2] "A showing by the Plaintiff that he was discharged following protected activities of which the employer was aware establishes a prima facie case of retaliatory dismissal." Aquira v. Chula Vista Sanitary Services, 542 F2d 779 13FEP 1436 (9th Cir. 1976).

Affairs v. Burdine, 450 US 248, 253, 101 S CT. 1089, 1093. 67 L Ed 2d 207 (1981)[3]

Not only was the defendant very much aware of petitioner Gibson's protected activity of expression at the LAX FSDO in 1988 and 1989, the Defendant was also very much aware that Gibson had filed an EEO Complaint, alleging retaliation and reprisal, in June 1990, against the Manager of the Fresno FSDO, Mr. Edward Hammonds. This complaint was based on the retaliatory actions of the manager of the Fresno FSDO, Mr. Hammonds, when he issued Gibson a '609' reexamination letter of intent on June 17, 1990, for "no probable cause," other than for alleging failing out of the FAA Academy.

After Mr. Hammonds had issued a '609' action against the petitioner, Gibson filed an EEO Complaint alleging retaliation and reprisal by the defendant because of the initial opposition to unlawful racial actions, which petitioner had made at the LAX FSDO, for having been failed out of the FAA Academy by the defendant, '609'd' (reexamined), and for having his FAA Medical Certificate revoked. All of these actions were leading up to the petitioners eventual termination from the FAA, the second time, and, which would have ruined his career in the field of aviation.

The lower court decision which granted Summary Judgment, is in direct conflict with the decision of the United States Court of Appeals for the Ninth Circuit in Aquira v.

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[3] "In order to show a prima facie case of discrimination, a plaintiff must offer evidence that gives rise to an inference of unlawful discrimination." Texas Department of Community Affairs v. Burdine, 450 US 248, 253, 101 S CT. 1089, 1093. 67 L Ed 2d 207 (1981).

Chula Vista Sanitary Service in 1976, and, in conflict with other Circuit Court decisions in reference to pretextual motive and retaliatory dismissal. (See Rainey v. Vinson Guard Service, Inc. 120 F 3d 1192 74FEP 1883 (11th Cir. 1997).[4] Crawford v. Runyon, 37 F 3d, 1341 (8th Cir '94).[5]

In reference to the decision of Administrative Law Judge F. Lamont Liggett to "Stay" the Agency's action to '609' (reexamine) Gibson's airman certificates, Judge Liggett found that because Mr. Hammonds had been the acting manager of the LAX FSDO, and was well acquainted with the personnel at the LAX FSDO, it was very probable that he had retaliated against Gibson.

On February 12, 1991, Merit Systems Protection Board Administrative Law Judge F. Lamont Liggett telephoned Gibson to tell him that he, Judge Liggett, would probably have to dismiss the "Stay" of the '609' action, issued on November 9, 1990, because, as he explained, the Merit Systems Protection Board in Washington, had held in another case that, an

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[4] "Relying on its earlier decision in Goldsmith v. City of Atmore, 996 F2d 1155 (11th Cir. 1993) the court held that in order to satisfy the "causal link" prong of a prima facie retaliation case, a plaintiff must, at a minimum, establish that the defendant was aware of the plaintiff's protective activity or expression at the time of discharge." Rainey v. Vinson Guard Service, Inc. 120 F3d 1192 74FEP 1883 (11th Cir. 1997).

[5] "Summary Judgment shall seldom be used in employment discrimination cases; Summary Judgment is appropriate only in those rare incidences where there is no dispute of fact and where there exist only one conclusion. Crawford v. Runyon, 37 F 3d, 1341 (8th Cir '94).

appellant filing an appeal under the Whistle Blowers Protection Act '91 (WPA) could not file an appeal as a "Whistle Blower," if the appeal was based on an EEO Complaint. Judge Liggett advised Gibson to let him dismiss the complaint, and, if and when the Agency terminated him, he, Judge Liggett, would hear the case. Judge Liggett assured the petitioner that this decision to dismiss the "Stay" of the '609' action, in no way reflected on the merits of the appellant's allegations, but was only based on the MSPB decision in Washington. Gibson did as he was advised and allowed Judge Liggett to dismiss the complaint. Within a few minutes, Mr. Hammonds was back at Gibson's desk with a new '609' letter which gave him ten (10) days to take the reexamination check ride. (In reference to the record) No additional training, except two flights in preparation for the '609' check ride had ever been offered. When Mr. Hammonds told Gibson that he did not have a future in Flight Standards, he meant it.

In February 1991, an attorney for the Western-Pacific Region's Assistant Chief Counsel's Office, Mr. Monrow Bolton called Gibson at the Fresno FSDO and told him that he would be allowed to take the check ride in Reno, Nevada, but that the <u>same</u> check airman from the Oakland FSDO would be brought in to give the reexamination. Again, there was absolutely no justifiable reason why this FAA Aviation Safety Inspector, from the Oakland FSDO, had to be brought in to Reno to give the check ride, because any other FAA Operations Inspector could have administrated the check ride. Mr. Hammonds <u>falsely</u> testified at the Merit Systems Protection Board termination hearing in September 1991, that the <u>particular</u> check airman, being brought in from the Oakland FSDO, was the "only" check

airman in the entire Western-Pacific Region who could give Gibson the check ride. This testimony was absolutely false and is contradicted by FAA memos and directives, (In reference to the record) which the Merit Systems Protection Board Administrative Law Judge Lon Bartholomew would not allow to be introduced at the termination hearing in September 1991.

The fact that Mr. Hammonds and the Assistant Chief Counsel's office had insisted that the check airman be brought in from the Oakland FSDO, for no justified reason, increased the suspicions of a conspiracy even more. This was especially due to the fact that Mr. Hammonds, Mr. Gibbons, Mr. James Murray, and, the Acting Divisional Manager of Flight Standards for the Western-Pacific Region, Mr. Richard Merriman, had all previously served at the Oakland FSDO at the same time, and were close personal friends.

Petitioner Gibson never refused to take the '609' check ride in the first place, but only asked to be allowed the same privileges as any other FAA certificated airman: a choice of where the FAA '609' check ride would be given. There was never any "probable cause" to any of these actions being taken against Gibson, however, there was strong inference and proof that these actions were highly discriminatory with a strong retaliatory motive.

On August 1, 1992, the petitioner received a "Notice of Proposed Certificate Action," informing him that he had until August 14, 1992 to take the check ride, or, his certificates would be revoked.

Petitioner Gibson has never had an accident, violation, incident, nor any infraction on his FAA Airman's History and Record, however, because he had allegedly

failed out of the FAA Academy, allegedly failed an instrument check ride, and, allegedly committed insubordination, by allegedly refusing to take the '609' check ride, his FAA Airman's Certificates were being "revoked." This was extremely unjust, unprecedented, and, for no probable cause, other than retaliation.

Petitioner Gibson and Norris have submitted a verified, authenticated list of over thirty (30) other FAA Aviation Safety Inspectors whom had failed out of the FAA Academy, only to be returned to their home office for additional training, or, more commonly, retained at the Academy for additional training, and, then recycled through a new class. (In reference to the record and enclosed) Not one other FAA Aviation Safety Inspector who failed out of the Academy was '609'd', terminated, etc., etc. This list of over thirty (30) other Aviation Safety Inspectors who attended the Academy was supplied by FAA EEO Investigators, FAA Inspectors/Supervisors, and, other FAA personnel with firsthand knowledge.

When the FAA's Assistant Chief Counsel of the Western-Pacific Region, Mr. Dewitt Lawson, issued an "Emergency Order of Suspension" of Petitioner Gibson's FAA Airman's Certificates on April 5, 1991, this order stated that the certificate would <u>remain suspended</u> until Gibson satisfactorily passed the '609' check ride. Nothing was ever said about <u>revocation</u> until the "Notice of Proposed Certificate action" was issued on July 29, 1992.

However, on August 14, 1992 the Assistant Chief Counsel served an "Order of Revocation" of all of Gibson's FAA airman certificates. The petitioner immediately appealed this Order of Revocation to the NTSB and a hearing was set for December 1992. When Gibson talked to

the NTSB administrative law judge, assigned to this hearing and was told that he could not call any witnesses to the hearing, he begged and borrowed whatever he could and went ahead and took the '609' reexamination check ride, out of the Western-Pacific Region.

Gibson's FAA Medical Certificate was returned in December 1990, with no restrictions, and, his FAA Airman Certificates were all reinstated in February 1993.

DISCOVERY AND INTERROGATORIES

The causative factors pertaining to the many deliberate, unlawful, personnel actions taken against Gibson and Norris, by supervisory personnel and department heads of the FAA's Western-Pacific Region, could and would have been unquestionably proven if the petitioner's discovery request had been answered, and, if the petitioners had been allowed to call witnesses. The lower court did not require the defendant to answer plaintiff's first set of interrogatories, and, provide requested documents, before granting a Summary Judgment.

See E.G. Poller v. Columbia Broadcasting Systems, Inc., 398 US 464, 473 (1962).[6]

The lower court ruled in the Civil Minute Order on September 30, 1996 that, "Gibson (and Norris) must produce specific, substantial evidence of pretext."

Specific, substantial evidence of pretext was presented and was unquestionably inferred with proof, however, evidently not proven by

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[6] In determining whether Summary Judgment is proper, a court ordinary must look at the record most favorable to the party opposing the motion, drawing all inferences most favorable to that party." E.G. Poller v. Columbia Broadcasting Systems, Inc., 398 US 464, 473 (1962).

clear and convincing evidence, because the petitioner's request for discovery - interrogatories and production of documents, were never answered. A preponderance of evidence was presented and unquestionably proven. See Sischo-Nownejad v. Merced Comm. College Dist., 934 F 2d 1104 (9th Cir. '91).[7] Wards Cove Packing Company v. Antonio, 490 US 642, 109 S CT 211 - 5.[8]

The decision in Sischo-Nownejad v. Merced Comm. College Dist 934 F 2d 1104 (9th Cir. '91) (Footnote:7) regarding evidence, and the granting of summary judgment to the defendant on any ground "relative to the merits," is in direct conflict with the decision of the U.S. Court of Appeals for the Ninth Circuit regarding petitioner's cases CV-92-4522 WDK and CV-94-7069 WDK. Adickes v. Kress

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[7] "The evidence may be either direct or circumstantial, and the amount that must be produced in order to create a prima facie case is very little. (Id at 1009) Normally, when such evidence had been introduced a court should not grant Summary Judgment to the defendant on any ground relative to the merits. Even if the defendant articulates a legitimate, non discriminatory reason for the challenged employment decision, thus shifting the burden to the plaintiff to prove that the articulated reason is pretextual, Summary Judgment is normally inappropriate." Sischo-Nownejad v. Merced Comm. College Dist.934 F 2d 1104 (9th Cir. '91).

[8] "Liberal Discovery Rules give plaintiffs in employment discrimination actions under Title VII of the Civil Rights Act of '64 (42 USCS § 2000e et Seq) broad access to employer's records in an effort to document the plaintiff's claims." See Wards Cove Packing Company v. Antonio, 490 US 642, 109 S CT 211 5.

Company, 398 US at 158 - 159.[9]

The Petitioner's inability to obtain the requested interrogatories and documents, and the fact that no witnesses have ever been allowed to be called by the Petitioners, is the only reason why the Petitioner's have been unable to submit "specific, substantial evidence of pretext," and, this is in direct violation of their Rights under the due process clause of the Fourteenth Amendment, and, the Federal Rules of Civil Procedure, (Rule c & f) 28 U.S.C.F. The evidence that would have been obtained, and, the testimony from witnesses who would have been called, would have definitely produced proven "specific, substantial evidence of pretext." See Hickman v. Taylor, 329 US 495, 67 S CT 385.[10] Celotex Corp. v. Catrett, 477 US 317, 106 S Ct - 2548 (86)[11]

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[9] "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for Summary Judgment or for a directed verdict. The evidence of the non-movant is to be believed, and all justified inferences are to be drawn in his favor." Adickes v. Kress Company, 398 US at 158 - 159.

[10] "The disposition-discovery rules (#27-37) of the Federal Rules of Civil Procedure are to be accorded a broad and liberal treatment, to the end that either party may obtain, in advance of trial, knowledge of relevant facts in possession of the other." Hickman v. Taylor, 329 US 495, 67 S CT 385.

[11] "Any potential problem with such premature motions (Summary Judgment) can be adequately dealt with under FED. Rules Civ. Proc. Rule 56 (f) which allows a Summary Judgment motion to be denied, or the hearing for the motion to be continued, if the non moving party has not had an opportunity to make full

The decision by the lower court, which was affirmed by the United States Court of Appeals for the Ninth Circuit is also in conflict with the decision in Crawford v. Britton, 523 US__, 140 L Ed 2d 759, 118 S CT (96-827)[12] and, Anderson v. Liberty Lobby, Inc., 477 US 242, 252 - 255 (1986).[13]

This decision is very comparable to the decision in Crawford v. Britton,523 US __, 140L Ed 2d 759, 118 S CT (96-827) in which the United States Court of Appeals for the District of Columbia held that in an unconstitutional - motive case, against public officials, a plaintiff must prove motive by "clear and convincing evidence."

Assistant U.S. Attorney, Sara Robinson, just briefly referred to the petitioner's request for discovery and first set of Interrogatories, and, merely commented that the defendant would have answered the request if it had been filed "timely."

The defendant has refused to answer the petitioner's discovery request, see US v. Proctor & Gamble Company, 358 US 677, 78 S CT

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discovery." Celotex Corp. v. Catrett, 477 US 317, 106 S Ct - 2548 (86).

[12] "The court of appeals erred in fashioning a heightened burden of proof for unconstitutional - motive cases against public officials." Crawford v. Britton, 523 US__, 140 L Ed 2d 759, 118 S CT (96-827).

[13] "Moreover, the court of appeals indirect effect to regulate discovery employees a blunt instrument that carries a high cost, for its rule also imposes a heightened standard of proof at trial upon plaintiffs' with bonafide constitutional claims." Anderson v. Liberty Lobby, Inc. 477 US 242, 252 - 255 (1986).

983,[14] and the lower court did not enforce the defendant's obligation to answer the plaintiff's request for discovery.

In July or August 1991, shortly after the National Transportation Safety Board hearing held in June 1991, (regarding the Emergency Order of Suspension of Gibson's FAA Airman's Certificates) Gibson called the Northwest Region's Denver FSDO and inquired about taking the '609' reexamination check ride in that region. Gibson spoke with an acquaintance of his at the Denver FSDO, FAA Inspector Walter Wise, and asked him about taking the reexamination check ride somewhere in that region. Inspector Wise reported this request to his operations supervisor, Mr. John Keller, whom had been an instructor at the FAA Academy, and was well acquainted with FAA Academy Supervisor of Flight Training, Mr. Lindsey "Pete" Helquist. Mr. Keller then called Mr. Helquist to find out just what had happened to "Inspector Gibson" when he was a student at the Academy. Mr. Keller, told Mr. Helquist, that Gibson had called the Denver FSDO and was planning to take the '609' check ride somewhere in the Northwest region. (Recall that Mr. Helquist was the last person to fly with Gibson at the FAA Academy on May 25, 1990, and, who then failed Gibson out of the Academy, who refused to allow Gibson to have any additional flight training time at the Academy, and, who sent him back to the Fresno FSDO.

When Mr. Keller told Mr. Helquist of Gibson's plans to take the '609' reexamination check ride in the Northwest Region, Mr.

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[14] "The government as a litigant is subject to the rules of discovery." US v. Proctor & Gamble Company, 358 US 677, 78 S CT 983.

Helquist then began telling Mr. Keller that Gibson had been "falling asleep" while flying aircraft at the Academy; that none of the other instructors at the Academy wanted to fly with him - because they feared he would "fall asleep"; and, that none of the other students wanted to ride in Gibson's personal vehicle because they were afraid he would "fall asleep." These accusations by Mr. Helquist were a complete lie, and, were made to Mr. Keller for no other reason than to negatively affect Gibson's chances at the '609' reexamination check ride. Mr. Keller's statement of this conversation with Mr. Helquist is in the record and enclosed.

FAA EEO Investigator Mr. George Dove, whom conducted a very thorough investigation of the EEO Complaint related to Gibson's termination on April 5, 1991, has stated that he never spoke to anyone at either the LAX FSDO, the Fresno FSDO, or, the Western-Pacific Region headquarters, that ever said or inferred that they had observed the slightest psychological or physical problems with Gibson. Mr. Dove is very willing to testify regarding his findings in support of Gibson.

At the MSPB hearing in September 1991, in regards to Gibson's second termination from the Agency, Mr. Helquist was called as a witness for the defendant and testified telephonically. When the defense attorney finished questioning Mr. Helquist, Gibson then asked Mr. Helquist if he had ever told anyone that he, Gibson, was falling asleep while flying aircraft at the Academy. Mr. Helquist snickered and then answered, "no, I have not." Then Gibson asked Mr. Helquist if he had ever told anyone that none of the other instructors wanted to fly with Gibson because they were afraid he would fall asleep. Mr. Helquist answered, "no, I have not." (In reference to

the record and enclosed)

Mr. Helquist was testifying under oath, and as of this date, has not been called upon to explain his perjured testimony. Mr. Helquist was directly responsible for Gibson being failed out of the Academy and returned to his home office. He could have allowed him to be retained at the Academy for additional refresher training, as all of the other FAA Aviation Safety Inspectors have been. In one class alone, seven of the twelve students failed out of the class, only to be retained at the Academy, or, returned to their home office for additional training. One student had to be given an additional 200 hours of instruction to successfully pass the program, however, they would never be returned to their home office, '609', terminated, etc., etc.

Before an applicant is employed by the FAA as an Aviation Safety Inspector, they must have successfully completed an extensive oral and flight check ride examination, with an FAA Aviation Safety Inspector, and, their application and personnel record - flight history, etc., is thoroughly investigated.

Not one of the personnel actions or charges taken against petitioner Gibson has ever proven to be of any merit or justification. The actions by the defendant were for no other reason than retaliation and reprisal because he had opposed intentional, unlawful racial actions being taken against FAA Inspector James E. Norris.

All of these numerous personnel actions have resulted in gross violations of Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, and, the Federal Rights of both petitions, Gibson and Norris. Their careers in Federal Civil Service have been ruined, and their careers in the field of aviation have been severely, if not

permanently, damaged, all in the name of racial bigotry, hate and retaliation.

Petitioner Gibson has tried in every way to resume his career in the field of aviation, however, because of the negative references on his FAA Aviation History File, his FAA Medical File, and his FAA Employment File, it has been virtually impossible. These actions of retaliation and reprisal have had major affects on both Petitioner Gibson's and Petitioner Norris' career, employment opportunities and family.

CONCLUSION

For the reasons set forth, petitioners respectfully request that the judgment of the United States Court of Appeals for the Ninth Circuit be vacated and remanded for further proceedings and due process with full discovery and witnesses at trial.

Respectfully submitted,

James Franklin Gibson

James Edward Norris, For JFG

Supreme Court, U.S.
FILED

981855 MAY 17 1999

OFFICE OF THE CLERK

No.

In The

Supreme Court of the United States

October Term, 1999

James Franklin Gibson,
James Edward Norris,
Pro Per

Petitioners

v.

Federico Pena, Secretary
Department of Transportation

Respondent

On Petition For Writ Of Certiorari
To The United States Court of Appeals for the
Ninth Circuit

APPENDIX FOR PETITION FOR WRIT OF CERTIORARI

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APPENDIX A

CONSTITUTIONAL PROVISIONS

United States Constitution, First Amendment:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridges the freedom of speech, or of the press, or of the right of people to peacefully assemble, and to petition the government for a redress of grievances."

This was in direct violation of the petitioners First Amendment rights as guaranteed under the Federal Constitution and was motived by an intent to retaliate against him for exercising his First Amendment rights. See Crawford v. Britton, 523 US 140 L ed 2Ed 759, 118 S CT (96-827).[1] Perry v. Sindermann, 408 US 593, 597 (1972).[2]

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[1] "The reason why a government officials retaliation against a person for speaking out on a matter of public concern offends the Federal Constitution - where the Constitution's First Amendment bars retaliation by a government official for protected speech - is that retaliation threatens to inhibit exercise of the protected right; retaliation is thus akin to an unconstitutional condition demanded for the receipt of a government - provided benefit." Crawford v. Britton, 523 US 140 L ED 2d 759, 118 S CT (96-827).

[2] "Retaliation is thus akin to an unconstitutional condition demanded for the receipt of a government-provided benefit." Perry v. Sindermann, 408 US 593, 597 (1972).

APPENDIX B

Title VII of the Civil Rights Act of 1964, and, the Civil Rights Acts of 1991. 29 CFR CH. xiv (7-1-98)

§1614.101 general policy

(a) It is the policy of the government of the United States to provide equal opportunity in employment for all persons, to prohibit discrimination in employment because of race, color, religion, sex, national origin, age or handicap and to promote the full realization of equal employment opportunity through a continuing affirmative program in each agency.

(b) Retaliation: No person shall be subject to retaliation for opposing any practice made unlawful by title VII of the Civil Rights Act (title VII) (42 U.S.C. 2000e et seq.), the Age Discrimination in Employment Act (ADEA) (29 U.S.C. 621 et seq.), the Equal Pay Act (29 U.S.C. 206(d)) or the Rehabilitation Act (29 U.S.C. 791 et seq.) Or for participating in any stage of administrative or judicial proceedings under those statutes.

APPENDIX C

Federal Rules of Civil Procedure, Rule 56 c & f, 28 U.S.C.A.

Rule 56C: Authorizes a District Court to enter Summary Judgment if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

Rule 56(f): "Should it appear from the affidavit of a party opposing the motion that he can not for reasons stated present by affidavit facts essential to justify his opposition the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained, or depositions to be taken, or discovery to be had, or may make such other order as is just."[3]

This requirement in turn is qualified by Rule 56(f)'s provision that Summary Judgment be refused where the non moving party has not had the opportunity to discover information that is essential to his opposition.

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[3] "Rule 56(f) ... which allows a Summary Judgment motion to be denied, or the hearing on the motion to be continued, if the non moving party has not had an opportunity to make full discovery." FED Rules of Civ Proc Rule 56(F).

See Anderson v. Liberty Lobby, Inc. 477 US 242, 252-255 (1986).[4]

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[4] The court further stated, "the plaintiff must present affirmative evidence in order to defeat a properly supported motion for Summary Judgment. This is true even where the evidence is likely to be within possession of the defendant, as long as the plaintiff has had a full opportunity to conduct discovery. We repeat, however, that the plaintiff, to survive the defendant's motion, need only present evidence that a jury might return a verdict in his favor. If he does so, there is a genuine issue of fact that requires a trial." Anderson v. Liberty Lobby, Inc. 477 US 242, 252 - 255 (1986).

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 92-4522 -WDK
Date Sept. 30, 1996

Title: James Franklin Gibson V. Federico Pena

PRESENT:

HON. WILLIAM D. KELLER ,JUDGE

Kathy Gault Peterson, Deputy Clerk
None Present, Court Reporter

Attorneys Present For Plaintiffs: Non present
Attorneys Present For Defendant: None Present

PROCEEDINGS:

Before the Court is Defendant's Motion for Summary Judgment. Plaintiff James Gibson, a white male, alleges discrimination based on race in violation of Title VII because Plaintiff opposed the alleged racial discrimination against a black male employee.

BACKGROUND

On July 1, 1988, Plaintiff was hired by the FAA to work at the Los Angeles International Airport Flight Standards District Office (FSDO). First Amended complaint ¶ 5. subsequently, Plaintiff complained about discrimination against a co-worker, James Norris. Id. Plaintiff's

position with the FAA was terminated on January 3, 1989 and plaintiff filed an EEOC claim against the FAA. Id. ¶ 7. This claim was settled and as part of the settlement Plaintiff was rehired as an Aviation safety Inspector by the FAA.

In September 1989, Plaintiff was transferred to the Fresno Airport Terminal Flight Standards District Office (Fresno FSDO). Complaint ¶¶ 7-8. Edward Hammonds was the manager at Fresno FSDO. Hammonds Declaration ¶ 3. Hammonds was informed that Gibson had been removed from his position at the LAX FSDO because of training problems and was being reinstated as part of a settlement. Id. Mr. Hammonds asserts that he was not told the Plaintiff was involved in a discrimination claim. Id.

At Fresno FSDO, Plaintiff was given on-the-job training. Id. ¶ 4. James Murray, Plaintiff's ground school and flight training instructor at Fresno, alleges that Plaintiff's flight skills were deficient. Declaration of James Murray, ¶ 2. Murray claims he had no knowledge that Plaintiff filed a discrimination claim until after Plaintiff left the Fresno FSDO. Id. ¶ 5. Murray gave Plaintiff training and found his landing "unsatisfactory" and would not sign off on that phase of Plaintiff's training. Murray Test, 14:8-16; 18: 2-4. Murray claims that Plaintiff was unable to complete his visual flight rules and instrument flight rules checkride. Id. at 15: 10-20. Gibson was unable to pass the instrument check-out portion during his proficiency checks. Id., 17:14-17. Proficiency in instrument flight rules is mandatory for an airline transport pilot certificate holder. Id., 17:18-20. Plaintiff claims that Murray gave him approval

to conduct check rides and therefore he did pass his instrument check ride. Declaration of James Gibson at 11.

In May 1990, Plaintiff went to the FAA's Academy in Oklahoma for his General Aviation Indoctrination course. All FAA General Aviation Safety Inspectors are required to successfully complete the course. Plaintiff received a failing grade in Course 20702 at the Academy. First Amended Complaint, ¶ 9. One of Plaintiff's instructors who failed him at the Academy was James Aadland. Plaintiff alleges that Aadland is a close personal friend of Robert Bebout, the supervisor who fired Plaintiff from LAX in 1989. Complaint ¶ 9. Plaintiff further alleges that Aadland failed him because of Bebout's influence.

Mr. Aadland asserts that he and Bebout are not close friends, they are merely working acquaintances. Declaration of Aadland at ¶ 5. Aadland claims that he had no contact with Bebout concerning Plaintiff at any time prior to or during Plaintiff's Indoctrination course. Id.

Another instructor at the Academy, Danny Goss, also failed Plaintiff. Plaintiff alleges that Goss deliberately failed him. First Amended Complaint. Goss gave Plaintiff a check ride in a Piper Cub as part of the Indoctrination Course. Goss claims that Gibson is the only person whoever scared him in a Piper Cub and that Plaintiff had deficient manual control and deficient aeronautical judgment. Declaration of Goss at ¶ 3. Goss refused to issue Plaintiff a FAA 4040.2 form to allow him to serve as a pilot-in-command of an aircraft. Id.

Plaintiff claims that Peter Helquist, another Academy Instructor, falsely failed Plaintiff during a flight proficiency check.

Plaintiff asserts that Helquist did not make any comments during the flight and then failed him.

Plaintiff claims that all of the instructors as the Academy know of his relationship to Mr. Norris and of Plaintiff's discrimination claim. Gibson Declaration at 19. Plaintiff alleges that thirty other aviation inspectors have failed the Indoctrination Course and they were either retained at the Academy or given new training. Id. at 21.

When Plaintiff returned from the Academy; Hammonds decided that he would evaluate Plaintiff's skills for himself. Declaration of Hammonds ¶ 7. Hammonds claims that the evaluation was designed to find out what Plaintiff's weaknesses were and to provide additional training. Id. Another instructor, Donald Mahaffy participated in the testing. Plaintiff's performance on the examination was substandard. Testimony of Mahaffy at NTSB Hearing, 34: 2-25; 8-16. Mr. Mahaffy claims that Plaintiff could not do weight and balance calculation, and was uniformed about what was happening in the air space. Id., 37:9-13; 38:15-25. Plaintiff alleges that he was "caught off guard" by the check ride and that he had a conflict with Mr. Mahaffy. Gibson Declaration at 24-25.

The FAA requested Plaintiff to submit to reexamination of his pilot's license based upon his failing grade at the Academy and other reports of substandard performance. First Amended Complaint ¶ 10. The FAA reexamination is known as a "609 ride." Plaintiff claims that the examiner, Jeffrey Hansen, has personal connections to Ed Hammonds, Plaintiff's supervisor at Fresno FSDO. Id. Hammonds states that he never had

a conversation with Inspector Hansen regarding Plaintiff's 609 examination. Hammonds Declaration, ¶ 8.

Plaintiff agreed to the reexamination, but failed to appear on the agreed-upon date. The day before the check ride, Plaintiff told his supervisor, Mr. Gibbons, that he was under "a lot of stress and tension" and would be unable to undertake the check ride. Gibson Declaration at 29. Plaintiff was given permission to see a therapist and was put on"non-flying" status. Id. Dr. Goodman, the Flight Surgeon for the Western Pacific Region, made the decision that plaintiff should not have flying status. Id. In September 1990, Dr. Goodman revoked Plaintiff's FAA Medical Certificate because he considered Plaintiff to have a "delusional (paranoid) disorder, persecutory type." Id. at 30.

Plaintiff's Medical Certificate was reinstated on January 15, 1991. Id. at 31. On February 14, 1991, Mr. Hammonds gave Plaintiff a new 609 which required Plaintiff to take the check ride within ten days. Id. Plaintiff failed to appear within ten days for his 609 ride. On February 25, 1991, plaintiff received a letter from Hammonds telling him that termination procedures had begun. Id.

As a result of Plaintiff's failure to take the 609 exam and failure to satisfactorily complete the course at the Academy, Plaintiff's employment was terminated on April 5, 1991. Defendant's Motion to Dismiss, Exhibit A.

DISCUSSION

1. Motion for Summary Judgment

Summary judgment is appropriate only

where there is "no genuine issue as to any material fact and ... the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56. All reasonable inferences are granted in favor of the non-moving party; however, the non-moving party must provide specific facts showing that there are genuine issues for trial. Fed.R. Civ.P. 56(e); Celotex Corp. v. Catrett, 477 U.S. 317, 323-25(1986). When "the record as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial." Matsushita Elec. Indus. Co. v Zenith Radio Corp., 475 U.S. 574,587 (1986).

In deciding a motion for Summary judgment, this court must "determine whether the 'specific facts' set forth by the non-moving party, coupled with the undisputed background or contextual facts, are such that a rational or reasonable jury might return a verdict in its favor based on the evidence." T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n,809 F.2d 626, 631 (9th Cir. 1987). A "party opposing summary judgment may not rest on conclusory allegations, but must set forth specific facts showing that there is a genuine issue for trial." Leer v. Murphy, 844F.2d 628, 631 (9th Cir. 1988). A "mere scintilla of evidence" is insufficient to oppose a summary judgment motion under Rule 56. Anderson v. Liberty Lobby Co., 477 U.S. 242, 252 (1986).

1. **Plaintiff Fails to Establish a Prima Facie Case of Retaliation Discrimination**

Plaintiff alleges that Defendant acted in violation of 42 U.S.C. § 2000e-3(a). Section 20003-3(a) makes it an unlawful employment

practice for any employer to discriminate against an employee because he has opposed any unlawful employment practice under Title VII.

To establish a prima facie case of retaliation discrimination, Plaintiff must establish that (1) he acted to protect his Title VII rights, (2) an adverse employment action was thereafter taken against him, and (3) that a causal link exists between the two events. Jordan v. Clark, 847 F.2d 1368, 1376 (9th Cir. 1988), cert. denied, 488 U.S 1006(1989). If a plaintiff can demonstrate a prima facie case of retaliation, the burden of production shifts to the defendant to advance a legitimate, non-retaliatory reason for any adverse actions taken against plaintiff. Id. If the defendant proffers a legitimate, non-retaliatory reason, the plaintiff has the burden of showing that the proffered reason is pretextual. Id.

1. Plaintiff Acted to Protect His Rights

There is no dispute that plaintiff's filing of a discrimination complaint with the EEOC constitutes protected activity. Defendant's Motion at 16.

2. Adverse Employment Action Was Taken

The heart of the dispute between Plaintiff and Defendant involves whether the actions taken against Plaintiff were retaliatory or whether they were taken for legitimate, non-retaliatory reasons.

1. Plaintiff Does not Establish that the FAA Academy Failed Him Because of his Earlier

Discrimination Claim

Evaluations/Conduct of James Aadland

Plaintiff alleges that James Aadland, one of his instructors at the FAA Academy, failed him because of his prior discrimination claim. Plaintiff claims that Aadland is a close personal friend of Robert Bebout, the supervisor who fired Plaintiff from LAX in 1989. Complaint ¶ 9. Plaintiff testified at his deposition that Bebout and Aadland "knew each other and had a strong personal relationship," Gibson Depo. 30:11-20, but could not assert any personal knowledge of this information. Id. at p.151-54. Plaintiff claims that he received the information about Bebout and Aadland from Bob Harris, an FAA Inspector. Gibson's Declaration 18:26-28; 19:1-2. Plaintiff has not provided any evidence to support his assertion. On the other hand, Defendant has produced a declaration by Bob Harris which states that he has no knowledge of a relationship between Bebout and Aadland. Declaration of Bob Harris, ¶ 2.

In addition, Mr. Aadland alleges that he and Bebout were just acquaintances and that he had no contact with Bebout concerning Plaintiff at any time prior to or during Plaintiff's course at the Academy. Aadland Declaration ¶ 5.

As far as Plaintiff's allegations against Aadland are concerned, Plaintiff has produced no evidence that raises a triable issue of fact.

Evaluations/conduct of Instructor Danny Goss

Plaintiff alleges that Danny Goss, an instructor at the FAA Academy, was biased against him because of the discrimination

claim. Plaintiff claims that after he took a check ride with Goss and he asked if he could have another hour of training; Goss replied "it doesn't matter." From this statement, Plaintiff infers that Goss was deliberately trying to fail him.

Defendant has produced evidence that Goss believed Plaintiff's flying skills to be deficient. Goss claims that Gibson is the only person whoever scared him in a Piper Cub and that Plaintiff had deficient manual control and deficient aeronautical judgment. Declaration of Goss at ¶ 3. In addition, there is no evidence that Goss was subject to any outside influence. Goss did not know Bebout and had no information about Plaintiff's discrimination claim. Id.

Plaintiff has not provided any specific facts to bolster his assertion that Goss's evaluations of him were based upon Plaintiff's earlier discrimination claim.

Evaluations/Conduct of Instructor Helquist

Plaintiff claims that Instructor Helquist failed him on a flight proficiency check because of his past discrimination claim. Plaintiff's basis for his assertion is that Helquist did not comment on Plaintiff's flying during the flight and told Plaintiff at the end that he had failed. Gibson Depo, 153:18-25; 154:1-4. Plaintiff's opinion is that Instructor Helquist was retaliating against him because if he was not retaliating, he would have made comments. This is a conclusory allegation that is not supported by specific facts.

Plaintiff alleges that many months later, when he was preparing to take his 609 flight, he contacted Walter Wise to find out about

refresher training. Gibson Declaration at 35:11-22. Plaintiff claims that Wise told hint that a supervisor, John Keller, had told him about a conversation with Helquist. Helquist allegedly told Keller that Gibson had fallen asleep while flying an airplane at the Academy. Id. at 35:28; 36:1-6. From this, Plaintiff concludes that Helquist was biased against him and acted to retaliate against him.

The fact that Helquist allegedly told Keller who allegedly told Wise who allegedly told Plaintiff what Helquist said about him months after Plaintiff's Indoctrination Course does not provide the necessary evidence of retaliation. Plaintiff has not provided declarations or affidavits from either Keller or Wise to support this allegation. Defendant, on the other hand, has the Declaration of Helquist that attests to the fact that he evaluated Plaintiff based solely on his abilities as a pilot. Declaration of Helquist at 1.

Plaintiff has provided no specific facts to create a genuine issue for trial concerning Instructor Helquist's evaluations or conduct.

Differential Treatment

Plaintiff claims that he was treated differently than other aviation safety inspectors which provides evidence that he was being retaliated against by the FAA. Plaintiff alleges that the FAA has allowed other inspectors who failed courses at the Academy to either remain at the Academy or return to their home offices for further training. Gibson Declaration at 20:28; 29:1-4. Plaintiff attaches a verified" list to his declaration. Gibson's Declaration, Exhibit 4. Plaintiff's list comes from

Inspector Wise who states: "Below is a list of individuals that I know of who were not successful on their first attempt at the flying portion of General Aviation Indoctrination at Oklahoma City." Id. at 1. The letter lists seven individuals and provides their work addresses. In addition, Plaintiff has compiled a list of twenty-five other individuals who failed various tests at the Academy who were not subject to a 609 check ride. Id. at 2. Plaintiff does not explain where he acquired this information.

Plaintiff's listing of names does not establish that the FAA was retaliating against him. The fact that various other inspectors, over an unspecified time period, were not subject to a 609 check ride does not show that Plaintiff's instructors at the Academy retaliated against him. A 609 check ride is an enforcement decision that is separate from an inspector's performance at the Academy. (see Part B below).

3. No causal Link Between Academy Failure and Discrimination claim

Once a defendant has presented legitimate, non-discriminatory reasons for its actions, the plaintiff must carry his ultimate burden either through direct evidence of discrimination or by showing that the proffered reason is a mere pretext for discrimination. St. Mary's Honor Center, et al. V. Hicks, 509 U.S. 502, 507 (1993). To show pretext, the plaintiff must show "both that the reason [given by the employer] was false, and that discrimination was the real reason." Id. at 510 (emphasis in original).

Gibson must produce "specific, substantial evidence of pretext." Seckl V.

Motorola, Inc., 703 F.2d 392, 393 (9th Cir. 1983). Gibson may not simply rely on his establishment of a prima facie case. Lindahl V. Air France, 930 F.2d 1434, 1437 (9th Cir. 1991). Summary judgment is not appropriate where the plaintiff simply asserts that the defendant's proffered reason is not credible. Wallis V. J.R. Simpson Co., 26 F.3d 885(9th Cir. 1994). A prima facie case is not enough to survive summary judgment. Id. Gibson must present some evidence that the Defendants' proffered reason for dismissal is pretextual.

Plaintiff has produced no evidence to demonstrate that his failure at the FAA Academy was caused by his earlier discrimination claim. Defendant's evidence shows that Plaintiff's failure was based upon numerous instructor's evaluations of his abilities. Each instructor presents a legitimate, non-retaliatory reason for failing Plaintiff. Therefore, even if Plaintiff had established a prima facie case (which he has not), Plaintiff has not proffered evidence to show the instructors' reasons are false or pretextual.

2. A 609 Checkride Is Not a Personnel Action Cognizable Under Title VII.

Plaintiff alleges that the 609 ride was ordered as retaliation against him. First Amended Complaint at ¶ 16. Plaintiff claims that the FSDO examiner, Jeffrey Hansen, had substantial personal connections with the manager of Fresno FSDO who has connections to the manager at LAX. Plaintiff asserts that the 609 ride "was calculated to cause him to fail irrespective of his actual performance." Id. at ¶ 16.

Defendant argues that the decision to order a 609 checkride is an enforcement

decision, based on factors which are entirely separate from Gibson's employment with the FAA.

In order for an alleged act of discrimination to be covered by Title VII, the act must be a "personnel action. 42 U.S.C. §2000e-16(a).

In a minute order granting summary judgment in a related action, James F. Gibson V. Federico Pena, CV-94-5318-WDK ("Gibson III"), this Court-ruled that a similar FAA action was not cognizable under Title VII. In Gibson III, this Court held that in an action to revoke Gibson's pilot certificate, the FAA was not acting as Gibson's employer. Minute Order at 5. Instead, the FAA was acting as a regulatory agency responsible for licensing all pilots, whether they are FAA employees or not. Whatever liability the FAA may have with regard to such proceedings, it is not governed by Title VII. Minute Order at 6.

Even if Plaintiff's allegations of improper action concerning the checkride are correct, suspension of Plaintiff's pilot's certificate is enforcement action, not a personnel action.[5]

CONCLUSION

Defendant's Motion for Summary Judgment is GRANTED.
IT IS SO ORDERED.

REFERENCE TO WELLS V. FAA
755, F.2d 804, 807 (11th Cir. 1985).

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[5] The Case law defining what constitutes an employment action is sparse. The 11th Circuit has held that the revocation of a pilot's certificate is not a personnel action, but an enforcement sanction. Wells v. FAA, 755, F.2d 804, 807 (11th Cir. 1985).

The lower court decision above, in APPENDIX A, minute order, dated September 30, 1996, the court held,

"In a minute order granting summary judgment in a related action, James F. Gibson v. Federico Pena, CV-94-5318-WDK (Gibson III) this court ruled that a similar FAA action was not cognizable under Title VII. In Gibson III, this court held that in an action to revoke Gibson's pilot certificate, the FAA was not acting as Gibson's employer. Minute Order at 5. Instead, the FAA was acting as a regulatory agency-responsible for licensing all pilots, whether they are FAA employees or not. Whatever liability the FAA may have with regard to such proceedings, it is not governed by Title VII.

Even if plaintiff's allegations of improper action concerning the check ride are correct, suspension of plaintiff's pilot certificate is an enforcement action, not a personnel action. (19).

The case law defining what constitutes an employment action is sparse. The Eleventh Circuit has held that the revocation of a pilot's certificate is not a personnel action but an enforcement sanction. Wells v. FAA 755 F 2d 804, 807 (11th Cir '85)." (19)

The United States Court of Appeals for the 11th Circuit held in their decision regarding Wells v. FAA that, "the revocation of the pilots Airline Transport Pilot Certificate was not a personnel action but an enforcement sanction."

No personnel actions were ever taken against the two (2) FAA pilots in Wells v. FAA. The pilot's FAA Airman's Certificates were not necessary for their continued employment with the FAA, as the airman's

certificates of Gibson and Norris were necessary for their continued employment with the FAA as Aviation Safety Inspectors, and, they received full pay and benefits while thus grounded, but lost the opportunity to accrue flight duty overtime pay. They could not, following an administrative hearing (NTSB) which returned their Airline Transport Pilot's Certificates, recover under the Back Pay Act for on-duty status pay lost, and for attorney fees.

Because revocation of their Airline Transport Pilot's Certificates was not a personnel action, because no personnel actions were taken against the two (2) pilots, however, an enforcement sanction was warranted because they had violated Federal Aviation regulations (FARs), and, recovery of attorney fees was precluded by the fact that no unjustified or unwarranted personnel actions had occurred. 5 U.S.C.A.§ 5596 (6) (1).

The actions taken against petitioner Gibson's FAA Airman Certificates were most positively personnel actions and not enforcement sanctions because of the fact that Gibson had not violated any Federal Aviation Regulations (FARs), or law which would have warranted an enforcement sanction, and the loss of employment resulting in a withdrawal or reduction of all or part of his employees pay, allowances or differentials. If the two (2) actions of suspending and revoking Gibson's FAA Airman's Certificates were an "enforcement sanction" why did the defendant not issue a Letter of Investigation (LOI) as required by FAA regulations.

Even though Gibson was a <u>former employee</u> of the FAA, at the time of the "Emergency Order of Suspension," of his FAA Airman

Certificates on April 5, 1991, and, the "ORDER OF REVOCATION" of his certificates on August 24, 1992, the Supreme Court of the United States has held that an employee may maintain a cause of action of § 704 (a) against a former employer for acts of retaliation occurring after the employment has ended. In Robinson v. Shell Oil Co., 117 S. CT. 849 (1997) a unanimous court determined that the context of § 704 (a) supports an interpretation of the word "employees" to include former employees for filing a charge.

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APPENDIX E

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JAMES E. NORRIS; JAMES FRANKLIN GIBSON,	)No. 97-55264
Plaintiffs -Appellants,	)D.C. Nos.)CV-92-04522-WDK)CV-94-07069-WDK
v.	)
FEDERICO PENA, Secretary of Transportation,	) MEMORANDUM *
Defendant-Appellee.	)

Appeal from the United States District Court
for the Central District of California
William D. Keller, District Judge, Presiding

Submitted July 20, 1998 **

Before: HUG, Chief Judge, and SCHROEDER and KOZINSKI, Circuit Judges.

* This disposition is not appropriate for publication and may not be cited to or used by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P.

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34(a); Ninth Circuit Rule 34-4.

James E. Norris and James Franklin Gibson appeal the district court's grant of defendant's motions for summary judgment in these consolidated cases. We have jurisdiction pursuant to 28 U.S.C. § 1291. We review the district court's grant of summary judgment de nova, see Bagdadi v. Nazar, 84 F.3d 1194, 1197 (9th Cir. 1996), and we affirm.

Norris and Gibson were Aviation Safety Inspectors employed by the Federal Aviation Administration ("FAA"). Gibson received a failing grade from the FAA Academy in a required course. Norris received failing grades in other courses taken at the FAA Academy.

After Norris and Gibson received these failing grades, the FAA required them to undergo reexaminations of their pilot's certificates pursuant to section 609 of the Federal Aviation Act of 1958, 49 U.S.C. § 44709. When they refused, their pilot certificates were suspended and their employment with the FAA was terminated.

Norris, an African American, alleges that the FAA's actions constituted racial discrimination in violation of Title VII of the Civil Rights Act, 42 U.S.C. § 200Ce-2. Among his numerous allegations, Norris claims that his supervisors denied him training opportunities that were made available to other Aviation Safety Inspectors. Norris also claims that he received failing grades in courses and flight proficiency checks as a result of

discrimination.

A plaintiff claiming disparate treatment on the basis of race bears the initial burden of establishing a prima facie case of employment discrimination. Yartzoff V. Thomas, 809 F.2d 1371, 1374 (9th Cir. 1987). If the plaintiff establishes a prima facie case of discrimination, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its actions. Id. If the defendant provides a legitimate, nondiscriminatory reason for its actions, the plaintiff must then raise a genuine factual issue by producing "'specific, substantial evidence of pretext.'" Wallis v. J.R. Simplot Co., 26 F.3d 885, 890 (9th Cir.1994) (quoting Steckl V. Motorola. Inc., 703 F.2d 392, 393 (9th Cir. 1983).

Even if Norris succeeded in presenting a prima facie case of disparate treatment, his discrimination claims ultimately fail. Norris has not produced specific, substantial evidence of pretext to rebut the FAA's articulated reasons for its actions. The district court did not err in granting defendant's motion for summary judgment on Norris' discrimination claims.

Gibson, who is white, claims that the FAA retaliated against him in violation of 42 U.S.C. § 2000e-3(a) for opposing perceived racial discrimination by the FAA against Norris. Among other things, Gibson alleged that various instructors at the FAA Academy gave Gibson failing grades, that he was required to undergo a section 609 check ride

and that he was ultimately terminated from his employment because of his previous involvement in EEOC actions.

On a motion for summary judgment, a plaintiff may establish a prima facie case of retaliation by demonstrating that (1) he engaged in a protected activity under Title VII; (2) his employer subjected him to an adverse employment action; and (3) there was a causal connection between the protected activity and the adverse action. Yartzoff, 809 F.2d at 1375. Gibson's evidence of a causal connection consists of "mere allegation and speculation." See Nelson V. Pima Community College, 83 F.3d 1075, 1081 (9th Cir.1996). It is insufficient to establish a prima facie case of retaliation. The district court did not err in granting defendant's motion for summary judgment on Gibson's retaliation claims.

We have considered Norris and Gibson's remaining claims and determined them to be without merit. We also deny Norris and Gibson's pending motions. The judgment of the district court is

AFFIRMED.

APPENDIX F

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JAMES E NORRIS; JAMES FRANKLIN GIBSON	)	No. 97-55264
Plaintiffs-Appellants,	)	DC No. CV-92-04522-WDK & CV-94-07069-WDK
v.	)	ORDER
FEDERICO PENA, Secretary of Transportation,	)	
Defendant-Appellee.	)	

Before: Chief Judge Hug, Schroeder and KOZINSKI, Circuit Judges.

The panel has voted to deny appellant's petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. See Fed. R.App. P.35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

The Appellants' motion to stay the mandate is denied. The Appellants' September 22, 1998 Motion for Leave to File Petition is granted.

No further filings shall be accepted in this closed docket.

APPENDIX G

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS
BOARD DECISION OF THE ADMINISTRATIVE LAW JUDGE
SACRAMENTO OFFICE OF APPEALS

916-855-7153

DATE MAILED: OCTOBER 9, 1991

CASE NO : S -UCFE-54249-0001-
DATE APPEAL FILED: JUNE 17, 1991

CLAIMANT : JAMES F. GIBSON
6411 MEADOW COUNTRY DR
RENO, NV 89509

DATE AND PLACE OF HEARING:
SSA NO.: 255-48-5443 OCTOBER 3, 1991
LO#-BYB: 901-04281
SACRAMENTO, CALIFORNIA

EMPLOYER: DEPT OF TRANSPORTATION
APPELLANT THE FRICK COMPANY -
P O BOX 283
ST LOUIS MO 63166-0000

PARTIES PRESENT:
CLAIMANT
EMPLOYER

STATEMENT OF FACTS

The employer appealed from the Department's determination which held that federal benefits were payable to the claimant on the ground the claimant had been discharged for reasons other than misconduct connected with his work.

The claimant initially worked for the employer agency as a GS-11, Air Safety Inspector in its Los Angeles facility. During that employment the claimant testified in some sort of discrimination case. This in turn led to his termination on January 3.

The claimant appealed from this termination action and in a negotiated settlement, was reinstated with back pay and was assigned to the Fresno office of the employer agency. He commenced work September 29, 1989 and continued until his termination March 20, 1991.

The employer contends the claimant was terminated solely because of his failure or refusal to undergo reexamination of his airman competency pursuant to a Section 609 requirement of the Federal Aviation Act of 1958. Prior to reaching that point there had been conflict between the claimant and the employer with respect to termination of the claimant's training, failure of the employer to approve geographic reassignment, performance evaluation and decertification as a pilot, and, what could be considered as an arbitrary or capricious effort to establish that the claimant was not mentally competent to carry out his duties. This latter obstacle was overcome when the claimant paid out of his own funds to have a psychiatric examination performed to establish that in fact he was mentally competent to perform the work.

It is the claimant's contention that by the time the various activities of the employer had reached the point of requiring him to undergo reexamination under Section 609, he was convinced that the employer had rigged the situation so that he would be sure to fail to pass and therefore he could see no point in performing what would be a useless

gesture. With respect to the 609 examination, the claimant had expressed a willingness to undergo such a test provided he be permitted to take the examination in the presence of someone other than the specific person selected by the employer from Oakland who the claimant believed was involved in the overall effort of the employer to terminate his services.

The claimant undertook a series of legal actions to protect his rights. He filed an appeal attempting to bring himself within the provisions of the Whistleblower Protection Act of 1990. He also filed an appeal with the Merit System protection Board. This latter action was dismissed subsequent to a hearing presumably on the basis that agency lacked jurisdiction because the claimant had also filed an appeal with the EEOC. Apparently, the Merit System Protection Board did not have jurisdiction once the EEOC action had been filed. A decision from the Equal Employment Opportunity Commission has not been rendered as of yet but raises the possibility of a collateral estoppel problem.

The employer concedes that it does not feel that any of the claimant's actions were the result of wilful disregard of duties with exception of his failure to take the Section 609 reexamination. The thrust of the employer's case indicates the suspicion that the claimant, was either mentally or physically incompetent to perform his assigned duties. These conclusions by the claimant's immediate supervisors are seriously questionable in light of all of the foregoing events which preceded the final action by the employer.

REASONS FOR DECISION

Section 8502 of Title 5 of the U.S. Code and supplementing regulations provide for unemployment benefits to federal employees. Entitlement to benefit payments is determined under the unemployment insurance law of the state to which wage credits have been assigned, which in this case is California.

Section 1256 of the Unemployment Insurance Code provides that an individual is disqualified for benefits if he or she has been discharged for misconduct connected with his or her most recent work.

Citing Maywood Glass Co. v. Stewart (1959), 170 Cal. App. 2d 719, the California Unemployment Insurance Appeals Board in precedent Decision P-B-3 defined "misconduct connected with the work" as a substantial breach by the claimant of an important duty or obligation owed the employer, wilful or wanton in character, and tending to injure the employer.

On the other hand, mere inefficiency, unsatisfactory conduct, poor performance as the result of inability or incapacity, isolated instances of ordinary negligence or inadvertence, or good faith errors in judgment or discretion are not misconduct.

The burden of showing a disqualification under section 1256 of the code is on the employer or the Department. A claimant is not required to show that he or she is not disqualified under that section (Prescod v. California unemployment Insurance Appeals Board (1976) 57 Cal.App.3d 29).

It is apparent from the record that the employer raised a series of hurdles which the claimant was required to surmount. The one that finally tripped the claimant was the request for the section 609 reexamination. At that point the claimant simply lost heart and

apparently decided there was no further use in exerting so much effort to preserve his job. It is evident that he expended a considerable amount of money in hiring an attorney as well as seeing a psychiatrist. Moreover, he was financially burdened by having his family in Reno and living in Fresno. His reluctance to take what appeared to him to be a rigged examination was understandable and justifiable in the circumstances.

Throughout it appears to be the employer's position that the claimant was not wilfully disregarding any duties he owed the employer but rather that he was simply not competent for the job. Accordingly, it is found that the employer has failed to sustained its burden of showing that the claimant was discharged for misconduct connected with work.

The question of collateral estoppel should be considered at this point. In view of the claimant's appeals from the personnel action regarding his termination, there might appear to be some question regarding resolution of those appeals. It would appear there is some inconsistency if in the EEOC appeal it is found that the claimant's termination was justified. Whereas in this case, it is concluded the claimant was not guilty of wilful misconduct.

In Amador V. Unemployment Insurance Appeals Board (1984), 35 Cal. 3d 671, it was held that because the issue of "insubordination" under the civil service rules of a county differed substantially from the issue of "misconduct" under section 1256, whether considered to be a legal issue or a factual issue, the doctrine of collateral estoppel did not give conclusive effect to the findings of a county civil service commission

that the claimant was suspended for "insubordination" for failure to perform "reasonable" assignments, in determining whether the claimant was discharged for misconduct.

It is concluded that the issues in the two cases are substantially different. The test for misconduct under the California Unemployment Insurance Code is totally different than the type of finding which would be handed down by the EEOC. There are different legal requirements. Accordingly, it is found that collateral estoppel would not apply in this case.

APPENDIX H

US Department of Transport
Federal Aviation Administration

Flight Standards District Office
5440 Roslyn Street, Ste. 201
Denver, Colorado 80216-6026
(803) 286-5400

February 10, 1993

Mr. James F. Gibson
6411 Meadow Country Drive
Reno, Nevada 89509

Dear Mr. Gibson:

This is to inform you that a reexamination of your ability to exercise your Commercial Pilot privileges on your Airline Transport Pilot Certificate #2007391, conducted on February 5 and February 8, 1993, at Natrona County International Airport, Casper, Wyoming, was satisfactory.

On February 5, 1993, you satisfied the requirements that were outlined in Commercial Pilot Test Standards dated September, 1988, as amended. All standards were met or exceeded as published in that guide.

On February 8, 1993, you satisfied the requirements that were outlined in the Airline Transport Pilot Test guide dated August, 1988, as amended. All standards were met or exceeded as published in that guide.

The results of this reexamination are a matter

of record and will be forwarded to the airman Records Office in Oklahoma city, Oklahoma.

Sincerely,

Signed by: Burl W. Hardesty
Aviation Safety Inspector

cc: AVN-460
Fresno FSDO. Attn: James Murray

APPENDIX I

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
SAN FRANCISCO REGIONAL OFFICE

JAMES F. GIBSON, Appellant, v. DEPARTMENT OF TRANSPORTATION, AGENCY.	)	DOCKET NUMBER SF12219OS90721 DATE: November 9, 1990

David S. Handsher, Esquire, San Francisco, California, for the appellant.

Rosemary Baca, Los Angeles, California for the agency.

BEFORE

F.LaMont Liggett
Administrative Judge

ORDER GRANTING REQUEST FOR STAY

On October 19, 1990, appellant refiled his request for a stay of various personnel actions, i.e., termination of training, failure to approve geographic reassignment, performance evaluation, and decertification as a pilot. The record shows that appellant had previously sought corrective action for some of the above actions through the office of the special Counsel (OSC) under the provisions of the Whistleblower Protection Act of 1990 (WPA). On November 2, 1990, the agency filed

a response to appellant's stay request. See Appeal file, Tab 2.

For the reasons set forth below, appellant's motion to stay his decertification as a pilot is Granted. With regard to the remaining alleged personnel actions, I find that the granting of a stay would be either inappropriate or impractical given the evidence presently before me.

LEGAL ANALYSTS AND FINDINGS

Appellant has been employed as an Aviation Safety Inspector in the Fresno, California, office from September 1989 until the present. Prior to his appointment to the agency's Fresno office, appellant was assigned to the same position at the agency's Los Angeles, California, office. Appellant alleges that he was terminated from his position in Los Angeles on January 3, 1989, in reprisal for providing testimony on behalf of a black coworker at a proceeding before the Equal Employment opportunity Commission (EEOC). See Appeal file, Tab 1, Appellant's Request for Stay, dated October 2, 1990.

Following his termination, appellant filed an EEO complaint alleging that his termination constituted an illegal act of reprisal. The parties resolved appellant's EEO complaint by mutually agreeing to a negotiated settlement of the disputed termination. Pursuant to the terms of the settlement agreement, appellant was reinstated to his position as a GS-11, Aviation Safety Inspector and reassigned, effective September 27, 1989,to his current position in Fresno, California.

It is undisputed that from September 1989 through March 1990, appellant performed all of the critical elements of his position as a GS-

11 Aviation Safety Inspector, in a fully satisfactory manner. Appellant received a performance appraisal verifying his job performance for this period. Notwithstanding his fully satisfactory job performance at Fresno, appellant claims that Edward Hammonds, his current second-level supervisor, and the former acting manager of the Los Angeles facility, conspired with other agency officials by taking, initiating, or refusing to take the various actions complained of in his stay request. Specifically, appellant argues that Hammonds, as the former acting facility manager of in Los Angeles, was fully aware of the reasons for his termination in Los Angeles. Further, appellant argues that Hammonds started a series of actions which eventually led to appellant's denial of a geographic reassignment to Reno, Nevada in April 1990.

Appellant also alleges that Jim Aadland, his instructor at the agency's Oklahoma Training facility has a long standing friendship with the supervisor who initially terminated appellant from his position in Los Angeles, California. As a result of the relationship between Aadland and his former supervisor in Los Angeles, appellant contends that his training at the Oklahoma facility was sabotaged by Aadland.

Appellant also alleges that upon his return from the Oklahoma Training facility, Hammonds who was aware that his training had been terminated in Oklahoma, refused to allow him to continue his duties as a Aviation Safety Instructor. Finally, appellant alleges that Hammonds told him on June 18,1990, that he intended to institute a 609 decertification action against appellant on the grounds that appellant was incompetent as an Airline

Transport Pilot.

In response, the agency denies that any of appellant's alleged whistleblowing activities played any part in the various decisions regarding his training in Oklahoma, his removal from Aviation Flight Inspector duties in Fresno by Hammond, or appellant's 609 decertification as a pilot. Agency argues, without citing any authority, that the decision of the Regional Flight Surgeon General to decertify appellant is not within the Board's jurisdiction. This argument is wholly without merit as the agency was unable to point to any law, rule or regulation under the WPA which excludes or otherwise shields decisions of the FAA or the Flight Surgeon General from Board review.

Further, although provided ample opportunity the agency failed to address or deny the following arguments pressed by appellant: 1) that Hammonds was the former acting facility Manager in Los Angeles, and was certainly aware of the reasons for appellant's termination at that facility: 2) that Aadland has a long standing friendship with the supervisor who terminated appellant in Los Angeles in 1989: and 3) that Hammonds removed appellant from all duties as a Aviation Safety Inspector upon his return from the Oklahoma training facility.

When viewed in isolation, the agency actions or in actions may well be fully explainable. However, given the undisputed background in this case, i.e., appellant was reinstated following a removal through settlement negotiations, he was found fully successful as an Aviation Safety Inspector in March 1990, then essentially incompetent for the same position some 5-months later, a strong inference exists that appellant's

whistleblowing activities were at least a "contributing factor" in his ultimate decertification. This inference would exist even if the flight surgeon general had no knowledge of appellant's whistleblowing activities because Hammonds, whether correctly or incorrectly, initiated the proceedings.

After carefully reviewing all of the evidence presented, find that the appellant has established that there is a substantial likelihood that he can prevail on the merits of his decertification, and that his alleged whistleblowing activity was a contributing factor in the final decision for decertification. Here, the evidence shows that appellant was decertified based primarily on the medical diagnosis of Ms. Rita D'Alvarez, a licensed clinical social worker (LCSW). And, my review of Alvarez' diagnosis shows that she failed to understand that at least some of the incidents cited by appellant were not the product of his imagination, but rather, actual events that undisputedly occurred. For example, appellant was removed and reinstated after filing an EEO complaint. Similarly, on the record before me it is uncontroverted that Hammonds, appellant's current immediate supervisor, was also the acting facility manager at the Los Angeles facility when appellant was terminated. Further, the agency did deny appellant's request for a reassignment from Fresno, California to Reno, Nevada, a transfer that would have allowed him to live at his home. Under the unique circumstances of this case, I find that the issue of appellant's medical and/or mental competence should have been reached only after he had been examined by a Board certified psychiatrist or licensed physician. I am unpersuaded by the opinion of

the licensed clinical social worker proffered by the agency.

The remaining issues raised by appellant, i.e., reassignment, performance appraisal, training, and prospective removal, are inappropriate for consideration of a stay at this point in the case. These issues are appropriate for review at the hearing in this matter. Accordingly, the 609 decertification of appellant's airman's pilot license is stayed pending further adjudication.

FOR THE BOARD:

_____

F Lamont Ligget Administrative Judge

BOARD REVIEW

Pursuant to 5 C.F.R. § 1209.3, any party may file an interlocutory appeal of an order granting or denying a stay as provided in 5 C.F.R. § 1201.91. A motion for certification must be filed with the administrative judge within 10-days of the date of this order.

MM

APPENDIX J

DIPLOMAT AMERICAN BOARD OF
PSYCHIATRY AND NEUROLOGY

KENNETH I. GOTTLIEB, M.D.
A PROFESSIONAL CORPORATION
1721 SCOTT STREET
SAN FRANCISCO, CALIFORNIA 94115
FILLMORE 6-2103

November 30, 1990

Stephen H. Goodman, M.D.
Regional Flight Surgeon
Federal Aviation Administration
P.O. Box 92007
Worldway Postal Center
Los Angeles, California 90009

Re: James Franklin GIBSON

Dear Mr. Goodman:

I am writing to you with regard to Mr. James F. Gibson who I saw in psychiatric consultation upon your authorization for the essential purpose of determining whether there is any psychiatric reason why he should not be able to continue in a training program with the Federal Aviation Administration and whether there is any psychiatric reason why he would not be able to operate a (private or commercial) aircraft under his current licensure.

A clinical examination was carried out in my office on November 26, 1990. Of the voluminous written material and correspondence

that Mr. Gibson had in his possession I elected to review only the report referred to below. (I would certainly be willing to review any additional documentation if you feel that is necessary.) An MMPI was administered at the time of the examination and was independently scored.

When asked for his understanding of the nature and purpose of this examination Mr. Gibson replied, "I went to a Licenced Clinical Social Worker...in Fresno...because I was under a lot of pressure regarding my piloting skills...She said I was delusional and paranoid...You're supposed to evaluate my psychological competency." I explained to Mr. Gibson that he was being seen For evaluative purposes only and that no treatment would be rendered. I indicated that a doctor-patient relationship did not exist, that what he said would not be regarded as confidential, that a report would be prepared and submitted to the flight surgeon of the FAA, and that his attorney would be provided a copy of that report. Mr. Gibson understood and was amenable to the parameters of the evaluation.

CIRCUMSTANCES LEADING TO EVALUATION:

James Gibson described the course of events culminating in the request for this evaluation as follows:

"I started taking flight instruction (when) I was fifteen. I got my private pilot licence in 1969 and my commercial license in 1970. I was always involved in the field of agricultural aviation...

"I became a flight instructor in Orange County in 1973. I taught in Orange County from 1973 until 1976 or 1977, when we moved to Lake Tahoe. I was out of it for a few

years...working in casinos. In 1978-79 I was teaching full time in Reno/Carson City/Truckee. I continued doing that...

"In 1986 I applied to the FAA to be an Aviation Safety Inspector." Mr. Gibson indicated that he was accepted into this program and was told to "report to LAX, Flight Standards District Office, on July 1, 1988 as an Aviation Safety Inspector.

Mr. Gibson reported as requested and immediately began his training. "I got into communication with a Negro fellow, Jim Norris, in my section. We talked about the civil rights days, sit-ins, freedom riders. The fellow in charge of my training, Jerry Pallard, asked what we were talking about. This appeared to start a suspicion about whether I would fit in with the unit. I learned that there was an ongoing movement to get rid of this(Negro) guy because of prejudice. I wouldn't join in.

"We were assigned to read books. There wasn't a lot of training.

"Around September, the manager, (Ms.) Bonnie Pankella and the supervisor, Bob Bebout, wanted me to take...Jim Norris on an evaluation/training exercise, in a simulator. It was to refresh the two of us. But my supervisor wanted me to evaluate him.

"When we returned Bob Bebout asked me, in front of Bonnie Pankella, point blank, 'How did he do?' I said, 'He did fine...but he's rusty.' Bebout hit the roof and stormed out...I don't think Bonnie Pankella understood what was going on...

"Things were never right after that with my relationship with Bebout. I was left to do nothing at my desk. I was given no assignments, no training functions. I was

just left to sit at my desk all day long.

"When I returned from vacation in January 1989 Bonnie Pankella handed me my termination papers. They said my training abilities were not sufficient. I went to Bill Williams, Regional Manager, and explained the situation. He took me to the civil rights office and left me with Vincent Jourbert. I explained the entire situation to him. He didn't think I had a case. He sent me to Personnel...and there I was told I had a case of retaliation. I went back to the civil rights office. He checked with Washington and assigned me to a counselor. She tried to resolve it informally and couldn't, so I filed a formal complaint.

"In July 1989 I got hired by American Airlines as an instructor in training on Boeing 737's. I was still communicating with the civil rights office...

"On September 11, 1989 I was offered a settlement of re-instatement to my previous job level, full back pay, sick leave - but with an assignment to Fresno. In September 1988 I had put in for a hardship transfer to Reno.

"I agreed to go to Fresno and reported there on September 27, 1989. The manager, Ed Hamlins, had been the Acting Manager in L.A. before I got there, and was aware of the Jim Norris situation. The first day (in Fresno) I offered to explain my side of the story. He said he didn't want to hear about it...

"I started training and satisfied 90% of my OJT projects. I was giving VFR/IFR check-rides, I warn rusty because I hadn't flown for so long. I was last evaluated in July 1988 on single and multi-engine aircraft and got high marks.

"After I was signed off on my performance evaluation form on March 24, 1990 by Mr. Cliff

Gibbons I drove home to Reno. I went to church and dinner with my wife and daughter. Ron Steele, the Operations Supervisor in Reno, called me over to his table and told me that he had a GS 11/12 opening - I should send him my papers.

"On April 17 I told my manager, Ed Hamlins, that this transfer could save my marriage and save me economically... He said Dick Merriman, the Assistant Regional Flight Standards Manager, said I had to stay in Fresno for a year and there was no GS 11/12 opening in Reno.

"That weekend I checked with Frances Ward, the administrative officer in Reno. She said there was an opening.

"In May 1990 I went to the Academy in Oklahoma City. My first flight instructor was a close personal friend of the supervisor in Los Angeles who had fired me. I wan rusty, I hadn't flown a super cub and didn't satisfy his requirements. In a Bonanza with another instructor I also didn't do well. Then went up for a check-ride with Pete Helquist. I did a near-perfect check-ride. When we got back he said - without explanation - 'I'm discontinuing your training right now...you're too far behind to continue.'

"I returned to Fresno and tried to explain to Hammonds and Gibbons. Hammonds told me to return to my desk. I had no job function or duties. I was assigned to assist the accident prevention specialist, Dick Hague. I was moved out of my Office to a cubicle desk. Hammonds told me not to use the telephone and took away my front door keep and airport badge.

Mr. Gibson said that as a result of the increasing emotional stress that he was experiencing as a result or his difficulties

with his employer in May 1990 he consulted Don Dyer, a psycho-therapist in Oklahoma City, through the Employees Assistance Program. He saw Mr. Dyer on two or three occasions. In May 1990 he also saw a clinical social worker, Bart Gibson, in Fresno. This was also for two or three visits, through the Employees Assistance Program. In June 1990 he received a "609 letter" requiring an evaluation of his piloting skills. "On the day before the check-ride I felt under too much pressure. I saw a therapist, Rita D'Alvarez, a licensed clinical social worker on July 17 and then for two other appointments."

Mr. Gibson indicated that this was his only psychological assistance with regard to the aforementioned episode.

Currently, Mr. Gibson lives in Reno and Fresno and continues to work at his position in Fresno.

He in not currently under any medical or psychiatric care. He takes no medications.

CURRENT COMPLAINTS:

At the present time Mr. Gibson has no psychiatric or physical complaints. He has a good appetite, sleeps well, does not complain of anxiety, depression, dysphoria, impaired concentration or any other typical psychiatric symptom.

PAST MEDICAL HISTORY:

1. In childhood there were the usual exanthems.

2. In 1958, while serving in the Air rare., Mr. Gibson apparently developed a contact dermatitis which was felt to be an allergy to wool (or possibly to something in the

barracks' water). His rash was unremitting. A thorough medical workup was done. He was offered a(n Honorable) Medical Discharge which he accepted.

3. In 1959 he had an automobile accident in which he ran his car off a road while asleep. He was hospitalized in Riverdale, Alabama with injury to a lower lumbar vertebra. He made a full recovery without sequelae.

4. In 1978 he rolled an automobile in a snow storm. He was hospitalized at Carson-Tahoe Hospital in Carson City where he had a splenectomy.

5. In 1984 ho suffered the distal digit of his left fifth finger while cutting wood.

Aside from the foregoing there have been no other significant injuries or illnesses. There have been no other hospitalization and no workers'compensation claims.

Mr. Gibson has not otherwise seen a psychiatrist, clinical psychologist, licensed clinical social worker or other mental health professional.

James Gibson smoked cigarettes regularly for thirty-six years but quit completely four years ago. He has consumed no alcohol whatsoever in the past twenty-one years and does not use street or non-prescription drugs. He drinks two to three cups of coffee daily. He does not drink tea.

PERSONAL HISTORY:

James Gibson was born in Atlanta, Georgia on September 27, 1939 and remained in Atlanta

until age twenty-seven.

His father died in 1979, in his eighties, following a stroke. father had been an insurance adjuster for the railroad and also worked for Allied Moving and Storage Company.

Mother, seventy-six, resides in Atlanta. she is a homemaker in good health.

A sister, age sixty, lives in Atlanta, is a married mother of three children. She works for Equifax as a computer programmer.

Mr. Gibson attended North Fulton High School through the 11th grade at which time he entered the United States Air Force on February 13, 1957. After one year, nine months service he received a medical discharge (as previously noted). While in the Air Force he completed his G.E.D. He attended university in Alabama from 1959 to 1960. He did a variety of odd jobs. In January 1962 be began tending bar and did that for the following two decades, while also working as a flight instructor.

Mr. Gibson moved to California in 1970 to attend the California Agricultural Aeronautics Crop Dusting School in Visalia. He got his commercial license at that tine.

In 1982 Mr. Gibson began working full-tine as a flight instructor. From 1978 to 1998 he was also a licensed private investigator in the State of Nevada.

James Gibson married on June 30, 1969. His wife, age forty-five, is a Registered Nurse and is currently the Nurse Manager of the ICU/CCU at Carson/Tahoe Hospital. The marriage has been strained by his firing in January 1989 and has been difficult since that time. There are two children. Their son died in 1980 at age eighteen in a motor vehicle accident. Their daughter, age twenty, is a

professional ice skater and has been in Japan for the past six months.

REVIEW OF THE MEDICAL RECORD:

Rita D'Alvarez, LCSW, in a report of August 15, 1990 reported that she first saw Mr. Gibson on July 17, 1990 when he requested psychotherapy for "problems at work and at home." Mr. Gibson described "reprisal at work stemming from his involvement in a racial discrimination situation on the job in July 1978. He described symptoms of sleep disturbance, constant worry and trouble concentrating as well as financial problems in connection with his employment problems. The diagnosis offered was: Delusional (Paranoid) Disorder, Persecutory Type. (The remainder of the two page letter discusses the diagnosis and offers nothing further about Mr. Gibson.)

James Gibson presented as a well developed, well nourished Caucasian man with bushy steel gray hair. He appeared promptly at the scheduled time of the examination. He had a normal stance and he walked with a normal gait. There was no evidence of pain behavior.

He was casually dressed in gray slacks, a white shirt and blue crew neck sweater and black shoes.

He was calm, cooperative and appropriate throughout the examination.

Examination of the sensorium was intact with appropriate orientation to tine, place and person.

Cognitive functioning was unimpaired. There was perfectly normal, attention, concentration, recent and remote memory and recall.

His affect was euthymic. There was no evidence of significant anxiety, depression or

other dysphoric state.

Thought processes were completely within normal limits. There was no evidence of loosening of associations, concreteness, paranoid ideation, delusions, hallucinations or any other stigmata of a psychotic disorder. Reasoning and judgment were intact.

ADMINISTRATION OF MMPI:

An MMPI was administered by the undersigned at the tine of the interview and scored independently. The MMPI profile was valid. The employee responded in a defensive manner and may be attempting to place himself in a favorable light by putting his best foot forward. He appears to be reluctant to admit to faults that most people share and are willing to disclose. Thus, the resulting MMPI profile may minimize problems and not give an accurate picture of the client's weaker points. The profile is fairly typical of individuals who take the test for pre-employment screening.

The employee appears to be an impulsive individual who tends seek immediate gratification of him wishes often without apparent concern for the consequences. He may tend to become frustrated and may not learn readily from his behavior. He may be aggressive and appear hostile at times. The employee may be experiencing some conflicts concerning his sex-role identity as he appears somewhat passive and effeminate in his responses indicating his orientation toward life. He may appear somewhat insecure in the masculine role and may be uncomfortable in relationships with women. His interests, in general, are more characteristic of women than men. He has a tendency to be quite passive and submissive in interpersonal relationships

and may tend to make concessions in an effort to avoid confrontation.

Interpersonally he appears likeable and makes a good impression on others. His relationship may be somewhat superficial. His behavior may he somewhat hedonistic and self-centered and he may tend to be insensitive to the needs of other people. He may currently be having some difficulty with family or personal relationships.

Outgoing and sociable, the employee has a strong need to be around others. He is gregarious and effective at gaining recognition from others although his personal relationships may be somewhat superficial.

The content of the employee's MMPI responses suggest that he may be fun-loving and may give the appearance of being "the life of the party at times. He enjoys being with others and has no problem speaking in front of groups.

This is a life-long personality trait pattern which is not likely to change over tine and may be compatible with a personality disorder; however, additional clinical correlation would be required.

DISCUSSION:

James Gibson is a fifty-one year old married Caucasian man who was seen in psychiatric consultation far the purpose of assessing his current mental state - specifically, the existence of significant personality disorder or psychosis - with regard to his ability to perform in his occupation.

His medical records were submitted for review; a single report of a licensed clinical social worker was reviewed.

The history obtained from Mr. Gibson is essentially as follows:

On July 1, 1988 he was to begin On-The-Job-Training as an Aviation Safety Inspector. He was terminated from that position six months later. By Mr. Gibsons's account, the termination was retaliatory in nature and was related to Mr. Gibson's association with a Black co-worker/ co-trainee. Apparently in the face at civil litigation Mr. Gibson was reinstated in his position with back pay in September 1989, however, he was assigned to Fresno, rather than LAX. He continued in his position at Fresno, less than completely satisfied. In April 1990 he learned of a position open in Reno (where he maintains a home with his wife) but found his superiors to deny the existence of that position. In May 1990 he went to the flight academy in Oklahoma City to brush up on skills. He found himself to be "rusty" and failed a check-out flight. On a second check-out flight he felt that he had been failed unreasonably. When he subsequently received a 609 letter, placing his pilot's license in jeopardy, he consulted a psychotherapist to address the anxiety he was experiencing in anticipation of his check-out flight. (He had consulted a number of therapists during the month of May 1990. These were all through the Employees Assistance Program.) A clinical social worker, in a letter of August 16, 1990 indicated that Mr. Gibson was suffering from a delusional (paranoid) disorder, persecutory type. The appropriateness of the continuation of Mr. Gibson's on-the-job-training was thus called into question as well, apparently, as his fitness to maintain his private and commercial pilot licenses.

James Gibson has no prior history or psychiatric illness, injury, disorder or treatment. His sole contact with a mental health professional was in the context of discussing his anxiety regarding his work situation and check-out flights.

To this examiner there is nothing whatsoever in Mr. Gibson's history, his description of his work situation or the single paragraph Ms. D'Alvarez's letter of August 16, 1990 that is in any way suggestive of paranoia, delusions, or feelings of persecution.

An MMPI administered by the undersigned reveals a profile typical of job applicants, individuals who are trying to make a good impression for purposes or employment. That is not surprising under the circumstances of this examination. There is absolutely no indication on the MMPI of psychosis, paranoia, delusions or any other form of severe psychopathology.

On clinical examination at this time Mr. Gibson presents as a soft spoken, clear thinking, fully presentable man who has a broad range of affect and absolutely no evidence of a thought disorder.

Mr. Gibson most clearly does <u>not</u> suffer from any psychotic disorder and certainly does <u>not</u> have auditory hallucinations.

While the MMPI is suggestive of personality traits which may be compatible with a personality disorder, I am unable to make such a diagnosis on the basis of the limited information available at this time. In any event, that determination is not relevant to the matter at band.

There is no evidence of organic impairment of mental functioning.

On the basis of this entire examination

there is no psychiatric reason why Mr. Gibson should hot be able to participate in any training program in the profession of his choice with the Federal Aviation Administration.

DIAGNOSIS:

Axis I:	v62.20	Occupational Problem
Axis II:	v71.09	No diagnosis
Axis III:		No diagnosis

Thank you very such for requesting that I evaluate this most Pleasant gentleman. Please feel free to call an me if I can be of further assistance.

Very truly yours,

Kenneth I. Gottlieb, M.D.

RIG:jmh

APPENDIX K

AFFIDAVIT

STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

I, Henry H. Polchow, of 5153 West 134 Place, Hawthorne, California 90250, an Aviation Safety Inspector, GS-1825-13 at the Los Angeles Flight Standards Office (LAX FSDO), Los Angeles, California hereby solemnly swear:

Did you ever hear Robert Bebout of the LAX FSDO make what you regarded as a threatening statement to another LAX FSDO employee concerning the performance of James Norris?

I did overhear Mr. Robert Bebout of LAX FSDO make a threatening statement to another LAX FSDO employee, Mr. James Gibson, apparently concerning the performance of Mr. James Norris.

As best you can remember, when was the statement made and what words were spoken?

This incident took place around the first part of 1988.I remember this because it was shortly after I finished the Aviation Management Course at the FAA Academy in Oklahoma City, OK. (OKC).

My beat recollection of the statement made by Mr. Bebout was "I'll get you for that which was directed toward Mr. Gibson in the corridor of the General Aviation Operations Section.

What were the circumstances surrounding this statement and who else was present?

At the time I was walking down the

hallway toward the General Aviation Operations Section when I heard Mr. Bebout's voice make the above statement. I looked into the corridor and Mr. Bebout was facing Mr. Gibson. Mr. Bebout saw me standing in the hallway, his face turned red and he walked right past me into his office, which was directly across the main hallway. I then proceeded to my desk. I then informed Mr. Donald Skunberg and Mr. Clair Milton, both LAX FSDO employees of what had happened. Mr. Milton then said he would find out what was going on from either Mr. Richard Swanson or Mr. Jerry Parrott, the following day. The following morning Mr. Milton informed me that Mr. Gibson had passed Mr. Norris on a check ride after being instructed by Mr. Bebout to fail him because he could not fly.

I have read the above statement, consisting of 2 pages and it is true and complete to the best of my knowledge and belief. I understand that the information given is not considered confidential and may be shown to the interested parties.

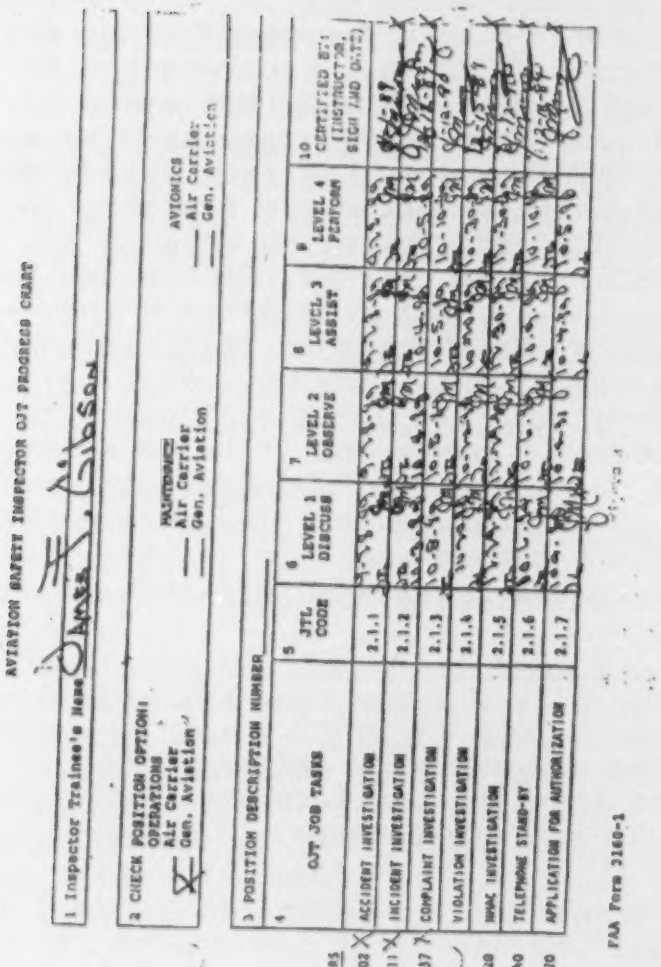
_____

Subscribed and sworn to before
me at Los Angeles, California
on this 2nd day of September, 1992.

CCC

APPENDIX L

AVIATION SAFETY INSPECTOR
OJT PROGRESS CHART



AVIATION SAFETY INSPECTOR OJT PROGRESS CHART

1 Inspector Trainee's Name

2 CHECK POSITION OPTION:
OPERATIONS
Air Carrier
Gen. Aviation

MAINTENANCE
Air Carrier
Gen. Aviation

AVIONICS
Air Carrier
Gen. Aviation

3 POSITION DESCRIPTION NUMBER

PIDS	4 OJT JOB TASKS	5 JTL CODE	6 LEVEL 1 DISCUSS	7 LEVEL 2 OBSERVE	8 LEVEL 3 ASSIST	9 LEVEL 4 PERFORM	10 CERTIFIED BY: (INSTRUCTOR, SIGN AND DATE)
1702	ACCIDENT INVESTIGATION	2.1.1					
1711	INCIDENT INVESTIGATION	2.1.2					
1737	COMPLAINT INVESTIGATION	2.1.3					
	VIOLATION INVESTIGATION	2.1.4					
1720	HAWK INVESTIGATION	2.1.5					
1040	TELEPHONE STAND-BY	2.1.6					
1220	APPLICATION FOR AUTHORIZATION	2.1.7					

FAA Form 3160-1

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3 [illegible] 4 DESCRIPTION NUMBER _____ PAGE 2

1	2 UIT JOB TASKS	5 JTL CODE	6 LEVEL 1 DISCUSS	7 LEVEL 2 OBSERVE	8 LEVEL 3 ASSIST	9 LEVEL 4 PERFORM	10 CERTIFIED BY (INSTRUCTOR, SIGN AND DATE)
1230	APPLICATION FOR WAIVER	2.1.8				3-7-90	
1260	TECHNICAL ASSISTANCE	2.1.17					
1741	TECH. ASSIS. TO LEGAL COUNSEL	2.1.18					
1743	COURT TRIALS - HEARING	2.1.19					
	REEXAMINATION - 609	2.1.34					9-2-90
1001	TECHNICAL DOCUMENTS	2.1.47					
1502	STUDENT PILOT	2.2.1					12-90
1503	PRIVATE PILOT	2.2.2					
1504	COMMERCIAL PILOT	2.2.3					
1510	ATP/TYPE/PROFICIENCY	2.2.4					
1525	CFI/INITIAL/REINSTATEMENT	2.2.5					
1527	CFI/RENEWAL	2.2.6					
	INSTRUMENT	2.2.7					
1530	GROUND INSTRUCTORS	2.2.12					
1576	AUTH. WRITTEN TEST	2.2.13					1-12-90
1531	MEDICAL TEST	2.2.14					1-2-90
1532	MILITARY COMPETENCE	2.2.16					1-12-90
1533	FOREIGN LICENSE	2.2.17					1-12-90
1536	WRITTEN EXAMINATION	2.2.24					

POS DESCRIPTION NUMBER

	4 OJT JOB TASKS	5 JTL CODE	6 LEVEL 1 DISCUSS	7 LEVEL 2 OBSERVE	8 LEVEL 3 ASSIST	9 LEVEL 4 PERFORM	10 CERTIFIED BY: (INSTRUCTOR, SIGN AND DATE)
1661	RAMP FAR 91	2.1.14					
1622	RAMP-121-125-135	2.1.41					
1662	CFI SURVEILLANCE	2.1.50					
--	COMPLETE GS-9						
--	RAMP FAR 137	2.1.23					
--	COMPLETE GS-11						
1813	A/C REQUIREMENTS ON FSB	2.1.9					
1814	MMEL ON FOEB	2.1.10					
1920	ACCIDENT PREVENTION PRESENTATION	2.1.11					
1440	A/C LEASE FAR 91.54	2.1.20					
1332	CONGESTED AREA PLAN - 137	2.1.22					
1332	CONGESTED AREA PLAN - 133	2.1.29					
1333	141 PHASE CHECKS	2.1.26					
1865	APPLICATION FOR DEVIATION	2.1.31					
1855	AIRPORT ANALYSIS DATA	2.1.46					
1302	EVALUATE A MANUAL	2.1.49					
1351	EVALUATE SIMULATOR	2.3.7					
1313	AIRCRAFT PROVING ROUTE	2.3.9					
1311	EMERGENCY PROCEDURES	2.3.10					
1312	POWER BACK PROCEDURES	2.3					

FFE

GGG

JOB DESCRIPTION NUMBER _____ PAGE 4

	4 OJT JOB TASKS	5 JTL CODE	6 LEVEL 1 DISCUSS	LEVEL 2 OBSERVE	8 LEVEL 3 ASSIST	9 LEVEL 4 PERFORM	10 CERTIFIED BY: (INSTRUCTOR, SIGN AND DATE)
1343	AIRCRAFT LEASE	2.3.12					
1579	KNOWLEDGE & SKILL TEST 137	2.3.17					
1682	EXECUTIVE OPERATOR	2.1.12					
1684	INDUSTRIAL OPERATOR	2.1.13					
85	MONITOR AIR RACE	2.1.15					
1686	MONITOR AIR SHOW	2.1.16					
1616	BASE INSPECTION 137 Part	2.1.24					
1616	BASE INSPECTION 121-135	2.1.21					
1626	TRAINING PROGRAM-141-63-65	2.1.25					
1616	BASE INSPECTION 125	2.1.27					
1616	INSPECT 133 OPERATORS	2.1.28					
1622	RAMP 133	2.1.30					
7	WRITTEN TEST EXAMINER	2.1.32					
1631	CHECK AIRMAN	2.1.33					
1626	TRAINING PROGRAM 121-135	2.1.37					
1636	FLIGHT LOCATING/FOLLOWING	2.1.38					
1627	CREW & DISPATCHER RECORDS	2.1.39					
1624	COCKPIT ENROUTE	2.1.40					
1845	AIRCRAFT OPERATIONS - ATC	2.1.42					
1635	STATION FACILITY INSPECTION	2 33					

HHH

	4 OJT JOB TASKS	5 JTL CODE	6 LEVEL 1 DISCUSS	LEVEL 2 OBSERVE	LEVEL 3 ASSIST	9 LEVEL 4 PERFORM	10 CERTIFIED BY: (INSTRUCTOR, SIGN AND DATE)
1625	CABIN ENROUTE	2.1.44					
1628	TRIP RECORDS	2.1.45		5-20-90	5-20-90		
1616	INSPECT 137 OPERATION	2.1.51					
1846	INSPECT AIRPORT	2.1.52					

APPENDIX M

PERFORMANCE APPRAISAL FORM

GIBSON, JAMES E.
SS#: 255-48-5443
Appraisal Period: 09/24/89 to 03/31/90

Title, Series and Grade:
Aviation Safety Inspector, GS-1825-11

Organizational Unit and Location:
FAT FSDO Fresno, CA

A. CERTIFICATION OF INITIAL DI3CUSSION AND APPROVAL OF PERFORMANCE PLAN:

Clifford Gibbons, Supv. OPS Unit
Signature of Supervisor

Edward Hammonds, Manager, Fresno FSDO
Signature of Approving Official

Date of discussion: 10/26/89

B: NA

C: SUMMARY PERFORMANCE RATING DETERMINATION:

To determine the summary rating, multiply the rating score for each job element by the weight factor of that element. This becomes the adjusted score. Next, add the adjusted scores and use the Conversion Table below to determine the summary rating, and check the appropriate box.

Job Element #	Rating Score	Weight	Adjusted Score
1	1 x	30	.30
2	1 x	30	.30
3	1 x	30	.30
4	1 x	5	.05
5	1 x	5	.05
Total			1.00

CONVERSION TABLE	
Performance Appraisal Score	Summary Rating
2.7 - 3.0 (no CJE less than Exceptional)	Outstanding (Level 5)
1.7-2.69 (No CJE less than Fully Successful)	Exceptional (Level 4)
1.0 - 1.69 (No CJE less than Fully Successful)	[X] Fully Successful (Level 3)
0 - .99 (No CJE less than Partially Successful)	Partially Successful (Level 2)
Minus Score	Unacceptable (Level 1)

Reason for Rating:
end of annual cycle

Clifford D. Gibbons, 3/26/90
Signature of Supervisor

Edward Hammonds, Manager, 3/26/90
Signature of Approving Official

D.

E.

F. PERFORMANCE PLAN

Job Element No. 1 of 5
Critical

TECHNICAL ADMINISTRATION

PERFORMANCE STANDARDS:

5. Investigation activities are thoroughly conducted in a timely manner with an impartial and unbiased approach.

6. Technical information provided is accurate and in accordance with FARs and national/regional policy.

7. The supervisor is informed of problems at the earliest possible time.

8. Required proficiency and technical training is satisfactorily completed.

9. Effective working relationships are

established which are conducive to the accomplishment of district office goals and objectives.

Examples of exceeding fully successful:

1. Anticipates problems and informed supervisor of problems at the earliest possible time.

2. Innovative techniques are applied in accomplishing work activities in an effective manner.

3. Additional work activities are independently prioritized.

G. ACTUAL ACHIEVEMENT:

Mr. Gibson is in training under direct supervision of a principal operations inspector. He has readily accepted all training and is now able to conduct many job functions. Investigations are properly conducted in a timely manner. He assists the POI in completing assigned work program activities, and keeps him informed of any problems. Mr. Gibson is well versed on the Federal Aviation Regulations and uses orders and notices to provide useful information to operators and the flying public. He has maintained a good rapport with the public. Mr. Gibson has performed a fully successful manner during this reporting period.

Rating: Fully successful

F. PERFORMANCE PLAN

Job Element No. 2 of 5
Critical

CERTIFICATION

PERFORMANCE STANDARDS:

1. Under supervision, certification actions are accomplished and documented in accordance with applicable standards and within established time frames.

2. Deficiencies/problems are promptly communicated through channels to the applicant for corrective action.

3. Certification actions are appropriately coordinated.

4. Required proficiency and technical training is satisfactorily completed.

5. An effective working relationship is maintained with the public, industry organizations, and governmental agencies. All contacts and responses are handled in a courteous and professional manner.

Examples of exceeding fully successful:

1. Suggestions are submitted which would improve the quality and timeliness of certification activities.

G. ACTUAL ACHIEVEMENT

Mr. Gibson, under the supervision of the POI, has accomplished the certification process in a complete, accurate and timely manner. Any problems discovered are promptly communicated. He assures that certification documents are complete and accurate, very seldom requiring corrections. His training progress has been most satisfactory. Mr. Gibson's contacts and responses with the operators, other organizations, and the general public are most courteous and proper.

Rating: Fully Successful

F. PERFORMANCE PLAN

Job Element No. 3 of 5
Critical

SURVEILLANCE:
PERFORMANCE STANDARDS:

1. Monitoring activities correctly indicate compliance/noncompliance with the FARs.

2. Deficiencies are promptly communicated through channels to the appropriate management levels.

3. Required proficiency and technical training is satisfactorily completed.

4. An effective working relationship is maintained with the public, industry organizations, and governmental agencies. All contacts and responses are handled in a courteous and professional manner.

NNN

Example of exceeding fully successful:

1. Recommendations for noted deficiencies are made and can be implemented without major revision.

G. ACTUAL ACHIEVEMENT:

Mr. Gibson, under supervision of the POI, has conducted various surveillance activities. He properly observes and checks operators and airmen to assure compliance with the FARs. Operator/airman deficiencies or noncompliance is promptly recorded and communicated to the appropriate level. His training progress is most satisfactory. Mr. Gibson has maintained an excellent rapport with the aviation operators and members of the flying public during these surveillance activities.

Rating: Fully successful.

F. PERFORMANCE PLAN

Job Element No. 4 of 5
Critical

PUBLIC/EMPLOYEE RELATIONS:

PERFORMANCE STANDARDS:

A. Public Relations
Communication with operator management personnel and the public reflects current FAA policy and programs. Communication and conduct with the public is accomplished in a professional and courteous manner.

OOO

B. Employee Relations

A. Promotes effective intraoffice communication through sharing and exchanging of information, ideas, and opinions. Participates in "quality circle" and "brainstorming" problem solving activity focusing on issues and facts, rather than on impressions and personalities. Approachable, listens carefully, and solicits opinions and feedback from others.

B. Creates a supportive work environment and team spirit within the organization by demonstrating a personal sensitivity to others feelings and needs. Co-workers are respected as individuals without discrimination. Fosters productive and cooperative working relations among other employees through open communication, negotiation and compromise.

G. ACTUAL ACHIEVEMENT:

Mr. Gibson has maintained in excellent working relationships with all operators and the public that he is associated with. All communications and the conduct of this mission is always accomplished in a courteous, professional manner.

He fosters good employee relations, he readily takes part in meetings. He is a team worker.

Rating: Fully Successful

F. PERFORMANCE PLAN

Job Element No. 5 of 5
Critical

EQUAL EMPLOYMENT OPPORTUNITY:

PERFORMANCE STANDARDS:

A. Maintains awareness of facility goals, objectives and philosophy on EEO matters and reflects it through positive actions.
   A. Participates in development of facility EEO action.
   B. Can explain to fellow employees agency goals and objectives.
   C. Takes positive action when necessary to correct erroneous conceptions of the EEO program.

B. Employee is aware of upward mobility opportunities and seeks to help those interested achieve their goals.
   A. Employee is made aware of job opportunities that are available.
   B. Makes referrals of team members who show potential.
   C. Assists fellow employees who need more development to improve their qualifications.

C. Promote mutual respect and equality among fellow employees.
   A. Identifies problems between fellow employees and attempts to resolve the problem.
   B. Personal leadership traits demonstrate fairness to all fellow employees.

QQQ

D. Reports complaints resolving discrimination.
   A. Recognizes and acts on discriminatory practices immediately.

G. ACTUAL ACHIEVEMENT:

Mr. Gibson maintains an awareness of the office EEO objectives and goals. He displays the team member qualities which help promote mutual respect and equality among his fellow employees.

Rating: Fully Successful

APPENDIX N

US Department
of Transportation

Federal Aviation
Administration

Subject: ACTION: Medical Disqualification of James F. Gibson

Date: October 23, 1990

From: Regional Flight Surgeon. AWP-300

Replay to Attn of: X 300

TO: JAMES F. GIBSON

A careful review of your application and report of physical examination of October 20, 1988, and, additional medical documentation received, discloses that you do not meet the medical standards prescribed in Para 57 of the Federal Aviation Regulations. By virtue of your psychiatric history of delusional (paranoid) disorder, persecutory type, it has been determined that you are not qualified for the second-class medical certificate issued to you.

We invite your attention to the provisions of Part 61.53 of the Federal Aviation Regulations and caution you that in view of this finding of disqualification, the exercise of the privileges of your certificate might constitute a violation of that section of the regulations.

A request for reconsideration may be made pursuant to Section 67.27, Part 67 of the Federal Aviation Regulations, by submitting a

written request in duplicate to the Federal Air Surgeon, Attn: Barton Pakull, M.D., Chief Psychiatrist, Federal Aviation Administration. AAM-201, 800 Independence Ave., S.W. Washington, D.C.. 20592. In the event no application for reconsideration is made within 30 days of this action, you will be deemed to have acquiesced in the denial and so have withdrawn your application for a medical certificate.

You are advised that it is unlawful under the Federal Aviation Regulations for you to exercise airman privileges unless you hold an appropriate medical certificate. Further, it is unlawful for the holder of a medical certificate to exercise such privileges if he has a known medical history or condition which makes him unable to meet the physical requirements for that certificate.

Stephen H. Goodman, M.D.

APPENDIX O

M E M O R A N D U M

U.S. Department of Transportation

Flight Standards District Office
5440 Roslyn Street, Ste. 201
Denver, Colorado 80216-6026

Federal Aviation Administration

Subj: INFORMATION: Aviation Safety Inspector Training at the FAA Academy

Date: 11-13-90

From: Walter R. Wise

To: James F. Gibson

Below is a list of individuals that I know of who were not successful on their first attempt at the flying portion of General Aviation Indoctrination at Oklahoma City, OK:

1. C.J. Pucciariello, FSDO Farmingdale, NY 11735
2. Tony Winton, FSDO-25 Teterboro, NJ 07608
3. Candace Carrera, FSDO-01 Seattle, WA
4. Dick Foreman, LAX FSDO Los Angeles, CA 90045
5. Larry Payne, FSDO Atlanta, GA
6. Dennis Fogarty, CMO Long Beach, CA

*failed in SEL only

None of these individuals were recommended for a 609 Flight check. Al of these individuals received additional training and

were eventually recycled through the GA/ASI Indoctrination training program at Oklahoma City, OK. Some of these individuals received additional training "on the spot", and some of them were returned to their FSDO's and recycled at a later date. Mr. Foreman and Mr. Davey received additional training on the spot without being returned to their FSDO's. Mr. Fogarty was restricted from giving FAA checkrides in taildrager type aircraft.

Signed by:

Walter R. Wise

11 Day Planning roster - April 11, 1991
Course 21100 Pilot Flight Testing Procedures
Class 91007 Beginning 91-04-22 Ending 91-05-03
conducted by AD

Student Name: Carrera, Candace C
SSN: 548-62-2681
Position Title: Aviation Safety Inspector (OPS Trainee)
PP-SER-CR: 08-1825-11
Region: NM Seattle FSDO

Student Name: Cox, Charles F. (X)
SSN: 538-64-0277
Position Title: Aviation Safety Inspector (OPS Trainee)
PP-SER-CR: 08-1825-11
Region: NM Seattle FSDO

Student Name: Fischer, Raymond W.
SSN: 139-28-1738
Position Title: Aviation Safety Inspector (OPS)
PP-SER-CR: 08-1825-12
Region: EA Teterboro FSDO

Student Name: French, Harold L.C
SSN: 324-30-4149
Position Title: Aviation Safety Inspector (OPS)
PP-SER-CR: 08-1825-12
Region: NE NE-03 FSDO

Student Name: Mueller, Arthur R. (X)
SSN: 355-38-7467
Position Title: Aviation Safety Inspector (Operations)
PP-SER-CR: 08-1825-12
Region: OL Detroit FSDO

WWW

Student Name: Ratcliff, Jimmy L. (X)
SSN: 524-66-3140
Position Title: Aviation Safety Inspector (Operations)
PP-SER-CR: 08-1825-11
Region: SW San Antonio FSDO

Student Name: Ream, George S.
SSN: 181-40-7120
Position Title: Aviation Safety Inspector (Operations)
PP-SER-CR: 08-1825-12
Region: OL Cincinnati FSDO

Student Name: Shadle, David L. (X)
SSN: 480-52-2438
Position Title: Aviation Safety Inspector (Operations)
PP-SER-CR: 08-1825-12
Region: OL Chicago FSDO

Student Name: Sheppard, Richard K. (X)
SSN: 145-38-9342
Position Title: Aviation Safety Inspector
PP-SER-CR: 08-1825-11
Region: SO Orlando FSDO

Student Name: Stevens, William M.
SSN: 003-30-6662
Position Title: Aviation Safety Inspector (Operations)
PP-SER-CR: 08-1825-12
Region: NE NE-01 FSDO

Student Name: Warmoth, Edward H.
SSN: 569-76-6600
Position Title: Aviation Safety Inspector (Operations)
PP-SER-CR: 08-1825-12
Region: SO Carribean FSDO

Student Name: Winton, Anthony B.
SSN: 415-04-2968
Position Title: Aviation Safety Inspector (OPB)
PP-SER-CR: 08-1825-12
Region: EA Teterboro FSDO

Enrollees to be hired by FAA: NONE

NOTE:
(X) indicates 2nd time thru flying portion of GA Indoc.

Harold L. French was on his third (3rd) attempt and still did not make it.

(1) **LUWANNA STELLE: AKA LONNIE:** Luwanna Stelle, while employed by the FAA as an Aviation Safety Inspector, failed two Academy classes. She was terminated from the FAA, and allowed to become a designated Pilot Examiner. She was not subjected to the Section 609 Administrative Process. She was not subjected to the Emergency suspension Process.

(2) **BETTY MILLER:** Betty Miller was an FAA Aviation Safety Inspector, who failed the FAA Academy. She was given approximately (50) hours of additional 4040.9 Pilot Proficiency Flight time to get up to standards. She was not subjected to the (609) Process, and did not have her Pilot Certificates Emergency Suspended.

(3) **ALBERTA BROWN:** Alberta Brown is another FAA Inspector, Ops who was hired with relatively low flying hours, (under 1500). She failed the FAA Academy and was given additional 4040.0 Pilot proficiency Flight

Hours. She was not subjected to the (609) Process and her Pilot Certificates were not Emergency Suspended.

(4) **HAROLD FRENCH:** Harold French is another FAA Inspector, Ops who attended the FAA Academy four times in order to graduate. He actually failed the FAA Academy three times, and graduated on the fourth try. Clearly this demonstrates incompetent piloting skills, and would require (609) Action. He was never subjected to Section 609 Action, and his FAA Pilot Certificates were never Emergency Suspended, or revoked.

(5) **LARRY E. PAYNE:** Larry E. Payne is an FAA Inspector assigned to the Atlanta FSDO. He failed the Baron End of Course Flight check two times in August 1989. He was re-cycled back through the academy, after additional 4040.9 flight time. He graduated the next time through. He was not subjected to the 609 Re-examination Process, and his FAA Pilot Certificates were not Emergency Suspended.

(6) **GERRAD WEAVER:** Inspector Weaver is an Inspector assigned to the Riverside FSDO. He was re-cycled through the FAA Academy and given approximately 50 additional flight proficiency hours, so he could graduate. He was not subjected to the 609 Process, nor was his Pilot Certificates suspended.

(7) **DENNIS FOGERTY:** Inspector Dennis Fogerty was graduated from the FAA Academy with the stipulation that he could not conduct Tailwheel Flight Evaluations, because he could not check out in tailwheel aircraft at the FAA Academy. This demonstrates incompetency, yet he was not subjected to Section 609

Administrative Action, and his FAA Pilot Certificates were not suspended in any way.

(8) **CANDANCE CARRERA:** Candance is an Inspector assigned to the Seattle FSDO. She was given a large number of 4040.9 Flight Proficiency hours so she could graduate from the FAA Academy, after substantiating substandard performance. She was not subjected to 609 Action, nor was her Pilot Certificates Emergency Suspended. Prior to her graduating from the FAA Academy, she was provided approximately 200 hours of 4040.9 Pilot Proficiency Flight Time.

(9) **LUANNE WILLS MERRILL:** Luanne is currently assigned to the Great Lakes Region, as an Aviation Safety Inspector. She was given between 150-200 flight hours to get her flight skills up to standard, such that she could check out at a FAA Academy to administer Flight checks to Other Inspectors. Despite this enormous flight time requirement, she was not subjected to the Section 609 Re-examination Process.

(10) **DICK FOREMAN:** Dick Forman is recently retired from the FAA Western Pacific Regional Office. While he was assigned to the LAX-FSDO as an Operations Inspector, he attended the FAA Basic General Operations Flight Indoctrination Class. He was not recommended for the End of Course Flight check by FAA Contract Instructors. He was given approximately 14 additional hours right at the FAA Academy, such that he could get checked out and passed in the course. He was not subjected to 609 Action.

(11) **CLYDE RHEA:** Clyde Rhea failed the End of

Course Baron check in August 1989. He was given additional flight time right at the FAA Academy. He passed the second flight check. He was not subjected to the 609 Process.

(12) **AUDREY SCHUETTE:** Audrey is a Former FAA Inspector, not retired. She was assigned to the Van Nuys FSDO. She could never graduate from the FAA Academy, due to substandard flying performance. Despite the fact that she could not graduate from the FAA Academy, she was still allowed the privilege to conduct flight checks to the aviation public. She retired from the FAA, never having graduated from the FAA Academy. She was never subjected to 609 or Emergency Pilot Suspension.

(13) **CARLA GONZALEZ:** Carla is now assigned to the Van Nuys FSDO as an Operations Inspector. She has Worked at the Los Angeles FSDO, and Seattle FSDO. She was given many additional flight hours to allow her to be able to graduate from the FAA Academy. She was never subjected to 609 and never suspended.

(14) **RAYMOND LLERAS:** Raymond was a Classmate of mine in the September thru November 1990 FAA Academy Class. He demonstrated incompetency by shutting off the fuel while in-flight on a training flight in the Tailwheel aircraft. He and his Instructor had to actually make a real emergency landing in a pasture. He was sent back to his FSDO for more training under the 4040.9 flight program. He was not subjected to the 609 process.

(15) **LARRY EVERSMEYER:** Inspector Eversmeyer was going to commit a violation of landing on a closed runway on July 18, 1991, if Oklahoma City tower had not stopped him and John Barry,

Ops Inspector from Baltimore FSDO. Inspector Eversmeyer arbitrarily failed James E. Norris during Jet Evaluation at the FAA Academy between July 8, 1991, and July 18, 1991, due to harassment, Race Discrimination, Reprisal and Retaliation for being in the USA May 30, 1991 News Article, about Discrimination in the Airline Industry. He was not subjected to Section 609.

(16) **RAY PAYNE:** Ray Payne was the Pilot-In-Command of the FAA Sabareliner N64, that ran off the runway into a Golf Course and destroyed the FAA Aircraft back in 1986/87. He was not subjected to 609 or Emergency Suspension. The aircraft is currently on display at the FAA Academy.

(17) **FAA SABRELINER CREW CRASHED:** Sometime during 1978-79 an FAA Sabreliner Flightcrew crashed into the ocean, near Recef Brazil. Both pilots were not 609'd or Emergency Suspended.

(18) **CLAIR MILTON:** Clair Milton is an FAA Inspector, Ops assigned to the LAX-FSDO. He failed a BE-1900 type course during July/August 1990. He also made some suicidal comments after he failed about crashing an FAA Aircraft and ending it all. He also has an Aircraft Accident on his record. He was not subjected to Section 609, nor was he referred for psychological evaluation to maintain his medical certificate.

(19) **C.J. PUCCIARIELLO:** Inspector Pucciariello failed the FAA Academy. He was not subjected to the Section 609 Process.

(20.) **MIKE DAVEY:** Inspector Tony Winton failed

the FAA Academy. He was not subjected to the Section 609 Process, and had his FAA Pilot Certificates Emergency Suspended.

(21) **TONY WINTON:** Inspector Tony Winton failed the FAA Academy. He was not subjected to the Section 609 Process, and had his FAA Pilot Certificates Emergency Suspended.

(22) **RAYMOND W. FISCHER:** Inspector Fischer failed the FAA Academy. He was not subjected to the 609 Process. He was not Emergency Suspended.

(23) **GEORGE S. REAM:** Inspector Ream failed the FAA Academy. He was not subjected to the Section 609 Process. He was not Emergency Suspended.

(24) **WILLIAM M. STEVENS:** Inspector Stevens failed the FAA Academy. He was not subjected to the 609 Process. He was not Emergency Suspended.

(25) **EDWARD H. WARMOTH:** Inspector Warmoth failed the FAA Academy. He was not subjected to the 609 Process, nor had his FAA Pilot Certificates Emergency Suspended.

(26) FAA CONTRACT FLIGHT INSTRUCTOR JOHN BURTON: In October 1991, FAA Contract Instructor Pilot, John burton and his student landed an Academy Aircraft with the landing gear retracted, causing damage to the aircraft. Neither the Instructor, nor the FAA Inspector Student were subjected to the 609 Process.

(27) B. THOMAS HOUSKA: B. Thomas Houska is a General Operations Inspector, currently

assigned to the LAX_FSDO. He failed the End of Course BE-58 Baron flight check at the FAA Academy. He was not subjected to the 609 Process.

(28) _____and _____ FAA Inspectors, assigned to the Helena Montana FSDO, while flying normal 4040.9 Pilot Proficiency Flight time, entered a spin, in N5, a C-90, while practicing approach to landing stalls. Neither Inspector was subjected to Section 609 Action. This incident took place on August 14, 1991.

(29) On August 22, 1991, _____, an FAA Academy Instructor, at the FAA Academy while taxiing for takeoff on the FAA Academy Ramp, in a PA-18 ASEL Tailwheel, struck a parked tug. The aircraft received substantial damage. There was no evidence that the Inspector/Instructor was ever subjected to Section 609 Action.

(30) On September 3, 1991, _____ and _____, two FAA Inspectors assigned to the Helena FSDO, Montana were conducting normal routine 4040.9 flight Proficiency flying. They were flying N6879C, a PA-34. The Pilot-In-Command, along with the Co-Pilot Inspector landed the aircraft with the brakes locked, causing damage to the wheel and brake system. There is no evidence of either FAA Inspector being subjected to Section 609 Administrative Action.

(31) On September 17, 1991, _____ an Aviation Safety Inspector, assigned to the Helena Montana FSDO, was flying normal routine 4040.9 Pilot Proficiency Flight Time. He

allowed the Cessna 210, N5520A to land in an attitude that caused the prop to strike the runway, causing consequential damage to the propeller. He was not subjected to the Section 609 Process.

(32) **MARION DITTMAN:** Marion Dittman was formally assigned to the Los Angeles FSDO, as an Air carrier Inspector, Operations. She failed the Boeing 727 Initial Training flight course at the FAA Academy on two occasions. In addition to failing the B-727 Flight courses twice, she was asked to leave a continental Jet Aircraft by the Captain In Command, for exhibiting substandard aircraft knowledge and for lack of professionalism. Despite all of the above evidence of incompetence, she was not subjected to Section 609 Action, and she did not have her FAA Pilot Certificates Emergency Suspended.

APPENDIX P

STATEMENT
JOHN L. KELLER
4231 PEACH WAY
BOULDER, CO 80301-1736
PH: 303-444-3240

SUBJECT: SUMMARY OF TELECON WITH PETE HELQUIST, FAA ACADEMY SUPERVISOR, GENERAL AVIATION BRANCH

While serving as an FAA Supervisory Aviation Safety Inspector at the Denver Flight Standards District Office (FSDO), I was asked by Aviation Safety Inspector Walter W. Wise if I could find out some additional information about a personnel action which was talking place against a former Aviation Safety Inspector, James Gibson, of the Western-Pacific Region. Because of my former position as an FAA Academy Instructor in the General Aviation Branch, I called Supervisory Inspector/Instruct Pete Helquist, about the circumstances surrounding James Gibson's failing the Inspector's Course at the FAA Academy.

The following is an unrefreshed recollection of the call with Mr. Helquist, which occurred sometime between July and September of 1991. I do not recall the exact date and time of the telephone call. After some exchange of pleasantries and information/update, I asked about the situation of a former student at the FAA Academy by the name of James Gibson. I also related that I had never met James Gibson, but had talked with him over the telephone.

Mr. Helquist related that James Gibson would, for unexplained reasons, fall asleep at the controls of an aircraft while in flight.

GGGG

These flights were performed in the normal course of the training of mr. Gibson as a General Aviation Safety Inspector-Operations. I queried Mr. Helquist if James Gibson had a sleep disorder or other illness or disease. He was not sure if there were any underlying causes for the falling asleep at the controls while in flight. Mr. Helquist also stated that the other instructors were fearful of flying with James Gibson because of his falling asleep at the controls of an aircraft while in flight. Additionally, Mr. Helquist related that the other students in the class would not drive with James Gibson because they were concerned that he would fall asleep while driving.

After I heard this information from Pete Helquist, I ended the conversation and related the information to Inspector Walter W. Wise who then relayed it to James Gibson.

END OF STATEMENT
June 10, 1997

Signed by:
John L. Keller

HHHH

APPENDIX Q

U.S. MERIT SYSTEMS PROTECTION BOARD HEARING ON SEPTEMBER 9, 1991 REGARDING JAMES F. GIBSON'S TERMINATION FROM THE FAA.

TESTIMONY FROM FAA ACADEMY SUPERVISOR OF FLIGHT TRAINING LINDSEY 'PETE' HELQUIST FOR FLEW WITH APPELLANT ON MAY 25, 1990 AND THEN FAILED HIM OUT OF THE ACADEMY.

.....

Gibson: Mr. Helquist, did you ever tell anyone, anywhere that I had ummm, ah fallen asleep while flying an aircraft at the F.A.A. Academy?

Helquist: No. I have not.

Gibson: Did you tell anyone that I was, umm, that no one else at the academy wanted to fly with me because of this?

Helquist: I did not.

.....